Supreme Court, U.S.
FILED

00-888 NOV 27 2000

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

THE SEVEN PROVINCES INSURANCE COMPANY N.V.,

Petitioner,

versus

COMMERCIAL UNION INSURANCE COMPANY, as Successor in Interest to Employers' Surplus Lines Insurance Company,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIAM SHIELDS
DAY, BERRY & HOWARD LLP
Twenty First Floor
260 Franklin Street
Boston, Massachusetts 02110
617-345-4600

MARK V. DUGAN
Counsel of Record
H. FRED NORTHCRAFT
BLACKWELL SANDERS PEPER MARTIN LLP
Two Pershing Square
2300 Main Street, Suite 1000
Kansas City, Missouri 64108
Telephone: 816-983-8000
Attorneys for Petitioner

9844

QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal court sitting in diversity may expand a principle of state law (here, the centuries-old reinsurance doctrine of "follow the settlements") with no guidance from any source as to how the state courts might rule?

2. Whether the reinsurance doctrine of "follow the settlements" restricts reinsurers from questioning ceding (reinsured) companies' allocations of settlement payments among pollution sites and insurance policies when the allocation was not addressed in the settlement?

3. Whether the reinsurance principle of "utmost good faith" restricts reinsurers from questioning ceding companies' allocations of settlement payments among sites and policies when the allocation was addressed in the settlement?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTES 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 8
CONCLUSION 19
APPENDIX
CIRCUIT COURT OPINION 1a
DISTRICT COURT ORDER 25a
ORDER DENYING REHEARING 70a
RELEVANT CONSTITUTIONAL , STATUTORY, ORDINANCE PROVISIONS INVOLVED 71a

TABLE OF AUTHORITIES

FEDERAL CASES

AETNA CAS. & SUR. CO. v. HOME INS. CO., 882 F.SUPP. 1328, 1346 (S.D.N.Y. 1995)..... 9, 10
AHERN v. SCHOLZ, 85 F.3D 794, 798 (1ST CIR. 1996) 18
BIRCHLER v. GEHL CO., 88 F.3D 518, 521 (7TH CIR. 1996) . 12
BURRIS CHEMICAL, INC. v. USX CORP., 10 F.3D 243, 247 (4TH CIR. 1993)..... 11
CHRISTIANIA GENERAL INS. CORP. v. GREAT AMERICAN INS. CO., 979 F.2D 268, 280 (2D CIR. 1992) 9, 12, 16
CITY OF PHILADELPHIA v. LEAD INDUS. ASS'N, 994 F.2D 112, 123 (3D CIR. 1993)..... 11
DOOYANG CORP., 147 F.3D 47 (1ST CIR. 1998)..... 18
ERIE RAILROAD CO. v. TOMPKINS, 304 U.S. 64, 78 (1938) . 11
FERRARA & DIMERCURIO, INC. v. ST. PAUL MERCURY INS. CO., 169 F.3D 43, 56 (1ST CIR. 1999)..... 18
FRANCE v. NEW ENGLAND REINS. CORP., 57 F.3D 56, 72 (1ST CIR. 1995)..... 15
MARTEL v. STAFFORD, 992 F.2D 1244, 1247 (1ST CIR. 1993)11
MENTOR INS. CO. v. BRANNKASSE, 996 F.2D 506, 517 (2D CIR. 1993)..... 9, 12
NORTH RIVER INS. CO. v. CIGNA REINSURANCE CO., 52 F.3D 1194, 1206 (3D CIR. 1995)..... 9, 10, 12
SOLOMON v. WALGREEN CO., 975 F.2D 1086, 1089 (5TH CIR. 1992)..... 11
STIPCICH v. METROPOLITAN LIFE INS. CO., 277 U.S. 311, 316 (1928) 15
UNIGARD SEC. INS. CO. v. NORTH RIVER INS. CO., 4 F.3D 1049, 1054 (2D CIR. 1993)..... 15
UNITED FIRE & CAS. CO. v. ARKWRIGHT MUT. INS. CO., 53 F.SUPP.2D 632, 642 (S.D.N.Y. 1999) 16

STATE CASES

ANTHONY'S PIER FOUR, INC. v. HBC ASSOCS., 411 MASS. 451, 583 N.E.2D 806, 821 (1991)..... 18

FEDERAL STATUTES

28 U.S.C. § 1332 3
28 U.S.C. 1254(L) 1
SUPREME COURT RULES 13 1

PETITION FOR A WRIT OF CERTIORARI

Seven Provinces petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit was published at 217 F.3d 33 (1st Cir. 2000) and is reprinted in the appendix at 1a. The opinion of the United States District Court for the District of Massachusetts was published at 9 F.Supp.2d 49 (D. Mass. 1998) and is reprinted in the appendix at 25a.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2000 (App. 1a). Seven Provinces timely filed a petition for rehearing *en banc*, or in the alternative, for panel rehearing, and the court of appeals denied Seven Provinces' petition on August 28, 2000 (App. 70a). Seven Provinces filed this petition within the time provided in Supreme Court Rules 13 and 30. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATUTES

The relevant portions of M.G.L. Chapter 93A are set forth in the appendix at 71a.

STATEMENT OF THE CASE

In August 1993, Commercial Union made a reinsurance claim against Seven Provinces for $225,000. Commercial Union alleged that Seven Provinces had issued a facultative certificate of reinsurance to Commercial Union's predecessor, Employers Surplus Lines Insurance Company ("ESLIC"), reinsuring one of several insurance policies that ESLIC had issued to Teledyne, Inc. for the 1963-1964 policy period.

Four months earlier, in April 1993, Commercial Union had entered into a $2.2 million insurance settlement with Teledyne, Inc. regarding hazardous waste claims. Commercial Union obtained an environmental release from Teledyne with respect to all policies issued to Teledyne and all pollution sites where Teledyne had liability.

In response, Seven Provinces raised questions regarding two issues. First, it was unclear whether Seven Provinces had in fact reinsured Commercial Union. Neither party had a copy of the alleged, 30-year-old facultative certificate of reinsurance. As proof of the alleged reinsurance relationship, Commercial Union provided only a single piece of paper with handwritten notes.

Second, to determine the basis of Commercial Union's claim against Seven Provinces, Seven Provinces sought information about Commercial Union 's allocation of its $2.2 million settlement with Teledyne among ESLIC policies, Teledyne pollution sites, and reinsurers. Initially, Seven Provinces was concerned because it appeared that a disproportionate amount of the settlement had been allocated to the 1963-1964 policy year, and thus to the policy that Seven Provinces had allegedly reinsured. Commercial Union had allocated its settlement payment among pollution sites,

rather than insurance policies, and in doing so, it had allocated only to 7 sites, even though it had obtained a release for all Teledyne sites, and the settlement agreement specifically listed 22 sites. The effect of limiting the number of sites was an increase in the amount allocated to each site, including the Teledyne Semiconductor site in Mountainview, California, the only site in operation during the period of the policy that Seven Provinces allegedly reinsured.

Seven Provinces later learned that, several months before making its reinsurance allocation and billing Seven Provinces, Commercial Union had prepared internal management documents dividing the settlement amount on an entirely different basis. Seven Provinces also learned that it was not the only reinsurer to question Commercial Union's allocation. Agency Managers, a group of reinsurers of a later policy, questioned the allocation and convinced Commercial Union to withdraw its reinsurance billing with respect to that policy.

In February 1995, a Seven Provinces representative and a reinsurance claims consultant traveled to Commercial Union's offices in Boston to review documents and meet with Commercial Union officials about the claim. Commercial Union promised copies of certain documents, but later refused to provide them, because Seven Provinces had not acknowledged that it was Commercial Union's reinsurer.

Commercial Union sued Seven Provinces in May 1995. Commercial Union filed its action in diversity in the United States District Court for the District of Massachusetts, the Honorable Nancy Gertner, United States District Judge. The District Court assumed jurisdiction pursuant to 28 U.S.C. § 1332. In addition to asserting a claim for breach of contract, Commercial Union sought damages under M.G.L.

Chapter 93A, alleging that Seven Provinces had committed an "unfair or deceptive act or practice."

Seven Provinces located the facultative certificate itself in a third party's warehouse in California and provided it to Commercial Union in August 1995. It was now clear that Seven Provinces had reinsured Commercial Union. Seven Provinces' limit of liability under the facultative certificate was $225,000 part of $450,000 excess of $50,000 primary insurance (combined single limit).

But the facultative certificate raised a new issue. The certificate required ESLIC to retain $225,000 of the risk itself, subject to certain reductions, and provided that if it retained less risk, Seven Provinces' liability was "to be proportionately reduced." Seven Provinces therefore raised questions regarding Commercial Union's application of other reinsurance to the risk that Seven Provinces reinsured. In July 1996, Commercial Union revealed that it had ceded $180,000 to other reinsurance and retained for its own account only $45,000.

After months of dispute over the retention issue and various procedural issues, and after attempts to mediate or arbitrate the dispute failed, discovery proceeded in 1997. In late 1997 both parties filed motions for partial summary judgment. Commercial Union argued, among other things, that, pursuant to the reinsurance doctrines of "follow the fortunes" and "follow the settlements," Seven Provinces was obligated to pay Commercial Union's claim.[1]

On January 5, 1998, the first scheduled day of trial, the District Court denied both parties' motions for summary judgment in order to hear testimony on the net retention and

---

[1] For purposes of this petition, the doctrines of "follow the fortunes" and "follow the settlements" are equivalent.

Chapter 93A issues. Trial proceeded before the Court for six days over an extended period in January 1998.

Seven Provinces argued at trial that its liability was only $45,000, the amount of risk Commercial Union retained for itself. Seven Provinces also argued that it had not committed an "unfair or deceptive act or practice." Seven Provinces presented evidence of its challenge to Commercial Union's allocation, but only to defend itself against the unfair trade practice claim. Seven Provinces did not request that the District Court invalidate Commercial Union's allocation.

On June 15, 1998, the District Court ruled in Commercial Union's favor on the net retention issue, although it held that both sides' interpretations were plausible. The District Court further held that Seven Provinces had not committed an unfair trade practice before it had located a copy of the facultative certificate because "until the rediscovery of the facultative certificate in August 1995, it had legitimate reasons for concern about the details of its obligations to [Commercial Union]." 9 F.Supp.2d at 70.

The court ruled, however, that Seven Provinces was liable under Chapter 93A from August 1995 forward because it did not then pay Commercial Union's claim and because its challenges regarding Commercial Union's allocation violated the "follow the settlements" doctrine, which "requires the reinsurer to follow the reinsured's good faith and reasonable allocation of settlement dollars between different sites and policies." 9 F.Supp.2d at 67-68. The court further held that Seven Provinces' conduct violated the reinsurance principle of "utmost good faith." *Id.* At 69.

After further proceedings regarding prejudgment interest and attorneys' fees, the District Court issued a final judgment, and Seven Provinces appealed. Seven Provinces

argued in the First Circuit that it was entitled to a reduction in liability because of Commercial Union's reduced retention. Seven Provinces further argued that it had not committed an "unfair or deceptive act or practice" because it had withheld payment based on a plausible interpretation of its obligations, supported by opinions from counsel and a claims expert, and because it had made offers of payment well in excess of what it believed it owed.

Seven Provinces also argued that its questions regarding Commercial Union's allocation were legitimate and permissible. The "follow the settlements" doctrine, Seven Provinces asserted, does not preclude reinsurers from questioning ceding companies' allocations – like Commercial Union's allocation – that are not part of the underlying settlement, but are made later for purposes of submitting a reinsurance claim.

On July 6, 2000, the First Circuit affirmed the District Court's ruling on the breach of contract issue and, over Judge Stahl's dissent, on the unfair trade practice issue. The court held that although Seven Provinces' primary defense, concerning Commercial Union's retention of risk, was plausible, Seven Provinces had avoided payment based on unacceptable defenses, "foremost" of which was its challenge to Commercial Union's allocation. 217 F.3d at 41. The court adopted the District Court's "follow the settlements equals follow the allocations" holding: "under the law of reinsurance the allocation could only be challenged on grounds of bad faith or unreasonableness." *Id.* at 42. The court further found that Seven Provinces had improperly raised questions regarding a "difference in conditions" policy and the "owned property" exclusion in the ESLIC policy. *Id.*

The court also held that the reinsurance doctrine of "utmost good faith," like the "follow the settlements" doctrine, "requires a reinsurer to indemnify its cedent for

losses that are even arguably within the scope of the coverage reinsured . . .." 217 F.3d at 43.

Judge Stahl dissented vigorously from the court's unfair trade practice finding, arguing that "the majority's approach . . . truly has no bounds" because it offers no guidance in determining when negotiating tactics become unfair. 217 F.3d at 45-46. Judge Stahl added that "every commercial litigant appearing in a federal court in Massachusetts must now fear that if it raises plausible defenses against a debatable claim," it will risk being held liable for an unfair trade practice. *Id.* at 46.

Seven Provinces petitioned for rehearing *en banc*, or, in the alternative, for panel rehearing, regarding the unfair trade practice finding. Seven Provinces argued that it had relied only on plausible defenses, that it had not acted extortionately, and that the court had overlooked critical issues. On August 28, 2000, the court denied Seven Provinces' petition. App. 70a.

REASONS FOR GRANTING THE PETITION

The Supreme Court has never issued a ruling regarding the "follow the settlements" doctrine. Relatively few courts, in fact, have addressed this issue, because reinsurance disputes are far more often arbitrated than litigated. But now the First Circuit has affirmed, with little discussion, the ruling of the District Court that the "follow the settlements" doctrine prohibits reinsurers from challenging reinsured companies' allocations of settlement payments among pollution sites and insurance policies, even if the allocation was not addressed in the settlement and was made several months after the settlement.

Neither the District Court nor the First Circuit cited any case law in support of this holding, and the District Court heard no expert testimony to that effect. Contrary to its obligations under *Erie Railroad v. Tompkins*, the District Court expanded a principle of state law with no guidance as to how the state courts might rule. Moreover, the District Court's ruling, and the First Circuit's ruling affirming the District Court, create a conflict in principle with all previous decisions that have addressed the "follow the settlements" doctrine. In addition, they have created confusion in the reinsurance industry and tilted the centuries-old balance between ceding companies and reinsurers in favor of ceding companies.

I. The "follow the settlements" doctrine does not restrict reinsurers from questioning or challenging ceding companies' post-settlement decisions.

Before the District Court ruled in this case, the law of "follow the settlements," a doctrine incorporated into the Seven Provinces reinsurance contract, was relatively clear. The doctrine "does not change the reinsurance contract; it

simply requires payment where the cedent's good-faith payment is at least arguably within the scope of the insurance coverage." *Mentor Ins. Co. v. Brannkasse*, 996 F.2d 506, 517 (2d Cir. 1993);[2] *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1206 (3d Cir. 1995). Under the doctrine, a reinsurer "cannot second guess the good faith liability determinations made by its reinsured, or the reinsured's good faith decision to waive defenses to which it may be entitled." *Christiania General Ins. Corp. v. Great American Ins. Co.*, 979 F.2d 268, 280 (2d Cir. 1992); *see also Aetna Cas. & Sur. Co. v. Home Ins. Co.*, 882 F.Supp. 1328, 1346 (S.D.N.Y. 1995).

Before this case, the "follow the settlements" doctrine had not been applied to a ceding company's post-settlement decisions. In fact, as the District Court acknowledged, the case law provided that the reasonableness of the ceding company's judgment "is to be determined as of the time of settlement." 9 F.Supp.2d at 66, *citing Aetna Cas. & Sur. Co. v. Home Ins. Co.*, 882 F.Supp. at 1351.

Seven Provinces' conduct was entirely in keeping with "follow the settlements" doctrine as it existed before this case. Seven Provinces never challenged Commercial Union's judgment in paying $2.2 million to its policyholder or in determining that its policies arguably covered Teledyne's losses. Seven Provinces did raise a question – but not an actual challenge – regarding Commercial Union's failure to allocate any part of the settlement payment to a "difference in conditions" policy. This question was no different from Seven Provinces' other inquiries regarding Commercial Union's post-settlement allocation. Seven

---

[2] The District Court erroneously cited *Mentor Ins. Co. v. Brannkasse* as holding that reinsurers must pay if the settlement is even arguably within the scope of *reinsurance* coverage. As noted above, the Second Circuit was referring to insurance coverage, not reinsurance coverage.

Provinces also raised a question at trial regarding the owned-property exclusion in the policy that Seven Provinces reinsured. This question, too, was entirely consistent with the "follow the settlements" doctrine, which does not require reinsurers to cover losses that are categorically outside the scope of insurance coverage. *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d at 1206; *Aetna Cas. & Sur. Co. v. Home Ins. Co.*, 882 F.Supp. at 1347.

A. The courts below exceeded their Article III authority in expanding the "follow the settlements" doctrine with no guidance as to how the state courts might rule.

Rather than apply the law of "follow the settlements" as it existed before this case, the District Court decided to expand the doctrine to cover not only settlement decisions, but also post-settlement decisions. The Court of Appeals, with little discussion, affirmed the District Court's ruling. In so ruling, the Court of Appeals cited only the District Court opinion. The District Court, for its part, cited nothing. As indicated above, before the District Court's ruling, no case had applied the doctrine to post-settlement decisions.

Nor did the District Court hear expert testimony on the expansion of the doctrine to post-settlement decisions. The only expert testimony the District Court cited, the statement of Commercial Union's expert that a reinsurer "must go along with however the insurer settled the claim," fell far short of the District Court's expansive conclusion.

Nor did the courts below cite any treatise, law review article, or text of any kind suggesting that courts should expand the "follow the settlements" doctrine to apply to post-settlement decisions.

Essentially, the District Court made up the law out of whole cloth, in a vacuum, as it saw fit. And the Court of Appeals, with little discussion, and without addressing Seven Provinces' argument that the District Court's "follow the settlements equals follow the allocations" finding was incorrect, affirmed the District Court.

These rulings by the District Court and the Court of Appeals were improper under this Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), in which this Court held that the Constitution does not grant federal courts the power to declare substantive rules of state common law. The role of a federal court sitting in diversity is not to decide the law as it wishes, but to predict how the highest state court would rule. As the Third Circuit held in *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 123 (3d Cir. 1993), a federal court sitting in diversity "is not free to shape common law as it sees fit" and "may not engage in judicial activism." Only state courts may "decide whether and to what extent they will expand state common law." *Id.*

Similarly, the Fourth Circuit held in *Burris Chemical, Inc. v. USX Corp.*, 10 F.3d 243, 247 (4th Cir. 1993), that, "[u]nder *Erie v. Tompkins*, . . . , federal courts sitting in diversity rule upon state law as it exists and do not surmise or suggest its expansion." Likewise, federal courts should not "steer state law into unprecedented configurations" and "must take state law as it stands." *Martel v. Stafford*, 992 F.2d 1244, 1247 (1st Cir. 1993). *See also Solomon v. Walgreen Co.*, 975 F.2d 1086, 1089 (5th Cir. 1992)(a federal court sitting in diversity "is Erie-bound to apply state law as it currently exists, and may not change that law or adopt innovative theories of recovery").

The Seventh Circuit described the cautious approach a federal court must take: when faced with competing, plausible interpretations of state law, a federal court should

choose "the narrower interpretation which restricts liability, rather than the more expansive interpretation which creates substantially more liability." *Birchler v. Gehl Co.*, 88 F.3d 518, 521 (7th Cir. 1996).

But the District Court here, and then the Court of Appeals, chose instead to expand the "follow the settlements" doctrine, creating substantially greater liability for Seven Provinces. The lower courts therefore exceeded their Article III authority in ruling that Seven Provinces' questions regarding Commercial Union's post-settlement allocation were improper.

B. The expansion of the "follow the settlements" doctrine creates a conflict in principle with other decisions.

As indicated above, numerous courts have held that the "follow the settlements" doctrine binds reinsurers to ceding companies' good-faith settlement decisions. *E.g., North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d at 1206; *Mentor Ins. Co. v. Brannkasse*, 996 F.2d at 517; *Christiania General Ins. Corp. v. Great American Ins. Co.*, 979 F.2d at 280. Because the District Court and Court of Appeals here held that the "follow the settlements" doctrine applies to decisions that are not part of insurance companies' settlements with their policyholders, these decisions create a conflict in principle with all previous decisions addressing the "follow the settlements" doctrine, since those decisions have applied the doctrine only to settlement decisions.

C. The decisions below unfairly expand the rights of ceding companies.

Reinsurance has for centuries been based on handshakes, cooperation between ceding companies and reinsurers, and the mutually applicable principle of "utmost good faith." The rulings of the courts below, if allowed to stand, will upset the balance between ceding companies and reinsurers and tilt the balance sharply in favor of ceding companies.

In the reinsurance world as it existed before this case, ceding companies generally performed settlement allocations reasonably, in good faith, and in line with their settlements. And while reinsurers did not always object, they did have the right to receive responses to their reasonable inquiries. But formally restricting reinsurers' rights to question and challenge allocations gives ceding companies license to allocate settlements arbitrarily, unfairly, and in a way designed to maximize reinsurance coverage. It leaves reinsurers with recourse only in the most extreme circumstances. And it unnecessarily erodes the centuries-old atmosphere of trust and cooperation between ceding companies and reinsurers.

D. The decisions below regarding the "follow the settlements" doctrine were incorrect.

1. The opinions below do not distinguish between settlement decisions and post-settlement decisions.

Not only did the courts below exceed their Article III authority in expanding the "follow the settlements" doctrine, those decisions were incorrect, primarily because the

decisions made no distinction between a ceding company's settlement decisions and post-settlement decisions. Indeed, the courts below do not even appear to have contemplated the question, although it was presented to them.

The basis of the District Court's decision that Seven Provinces may not challenge Commercial Union's allocation was that allocation among policies "is not much different from the more general decision that the losses are covered by the policies." 9 F.Supp.2d at 67. In the context of latent insurance claims, though, these determinations are entirely separate. Insurance coverage settlements are generally based on at least a potential coverage liability. Most settlements, however, do not address allocation among policies. That issue is often left to separate determinations by policyholders and insurers, who may want to allocate differently for different purposes. A policyholder may want to allocate one way for purposes of collecting claims from other insurers, and the insurer may want to allocate another way for reinsurance purposes. There is no basis for applying the "follow the settlements" doctrine to this separate, post-settlement allocation.

2. Allowing reinsurers to challenge ceding companies' post-settlement actions and decisions will not impede settlements or cause litigation to proliferate.

In support of its "follow the settlements equals follow the allocations" holding, the District Court, and by extension, the Court of Appeals, held that allowing challenges to allocations would "undermin[e] settlement and foster[] litigation." 9 F.Supp.2d at 68. This conclusion is groundless. There is no reason to believe settlements would be undermined if ceding companies are denied free reign on post-settlement

allocations. The only settlements the new "follow the allocations" holding might encourage would be those in which insurers and policyholders collude to shift the burden to reinsurers, whose ability to defend themselves would be limited.

Nor would litigation proliferate, since it did not proliferate before the District Court applied the "follow the settlements" doctrine to post-settlement allocations. There is much litigation involving insurers and policyholders regarding allocation, but that would not be affected by imposing new restrictions on reinsurers.

In any event, most reinsurance disputes are arbitrated, not litigated. There is no reason to believe that restoring the status quo before the District Court's ruling would change this long-time reinsurance practice.

II. The "utmost good faith" doctrine does not restrict reinsurers from questioning or challenging ceding companies' post-settlement actions and decisions.

"Utmost good faith" is a reinsurance principle that grew out of marine insurance. Actually, this Court held in 1928 that the principle is implied in all insurance contracts. *Stipcich v. Metropolitan Life Ins. Co.*, 277 U.S. 311, 316 (1928)("[i]nsurance policies are traditionally contracts *uberrimae fidei*"). But the principle is particularly important for reinsurers, who must pay reinsurance claims even though they have no control over the underlying defense, or even over information regarding the claim. The "utmost good faith" doctrine is often cited with respect to the sharing of information between ceding companies and reinsurers. *Compagnie de Reassurance D'Ile de France v. New England Reins. Corp.*, 57 F.3d 56, 72 (1st Cir. 1995); *Unigard Sec. Ins. Co. v. North River Ins. Co.*, 4 F.3d 1049, 1054 (2d Cir. 1993).

As Commercial Union's expert testified, the requirement of "utmost good faith" applies to both ceding companies and reinsurers. Before this case, it had never been used to favor ceding companies in imposing reinsurance allocations or in requiring reinsurers to give up defenses under their contracts.

In holding that Seven Provinces violated the principle of "utmost good faith," the Court of Appeals equated that principle with the "follow the settlements" doctrine:

> "utmost good faith . . . requires a reinsurer to indemnify its cedent for losses that are even arguably within the scope of coverage reinsured, and not to refuse to pay merely because there may be another reasonable interpretation of the parties' obligations under which the reinsurer could avoid payment."

217 F.3d at 43, *quoting United Fire & Cas. Co. v. Arkwright Mut. Ins. Co.*, 53 F.Supp.2d 632, 642 (S.D.N.Y. 1999); *see also Christiania Gen. Ins. Corp. v. Great American Ins. Co.*, *supra*, 979 F.2d 268, 280-81 (2d Cir. 1992). This language is the same language often used to describe the "follow the settlements" doctrine. For the same reasons that the "follow the settlements" doctrine should not be expanded, the principle of "utmost good faith" should not be expanded to favor ceding companies over reinsurers.

III. The decisions below affect reinsurers and other litigants broadly and unfairly.

As indicated above, the Court of Appeals' decision did not just affect Seven Provinces, but it unfairly tilted the

balance in the reinsurance industry against reinsurers and in favor of ceding companies. Reinsurers must now be wary of asserting their rights to challenge allocations that appear unfair or designed to maximize reinsurance coverage.

This upsetting of the balance is likely to have significant economic effects. Increased reinsurance claims can result in increased reinsurance premiums and are ultimately likely to affect policyholders as well. There remain insurance and reinsurance contracts with open claims dating from the 1950s or earlier through the present, with claims still arising from those periods based on pollution, asbestos, pharmaceutical, and other liabilities, often with multi-millions, and even billions, of commercial dollars involved.

In addition, the Court of Appeals' decision has a chilling effect on all companies doing business in Massachusetts, where a company can now be held liable for committing an "unfair or deceptive act or practice" even though it withholds payment pursuant to plausible contract defenses. As Judge Stahl opined, "the majority's approach . . truly has no bounds." 217 F.3d at 45. A company may face unfair trade practice liability "simply because it chose to fight and lost." *Id.* Indeed, the holding could be expanded beyond Massachusetts to any state with a statute prohibiting unfair trade practices.

IV. Based on their misstatements of reinsurance law, the courts below erroneously concluded that Seven Provinces had committed an "unfair or deceptive act or practice."

Based on their expansion of the "follow the settlements" doctrine to apply to Commercial Union's post-settlement allocation, the courts below held that Seven

Provinces had unfairly delayed payment and raised too many questions. If the "follow the settlements" doctrine is restored to its earlier meaning, there will no longer be any basis for holding Seven Provinces liable for committing an "unfair or deceptive act or practice." But if the lower courts' expansion of the doctrine is allowed to stand, Seven Provinces will be forced to pay double damages and Commercial Union's attorneys' fees, even though:

- Seven Provinces withheld payment based on a defense it believed was strong and the courts below found to be "plausible";
- Seven Provinces never asserted a defense it knew to lack merit;
- Seven Provinces withheld payment in reliance on the advice of counsel and an expert claims consultant;
- Seven Provinces did not use nonpayment as a wedge to gain some additional benefit for itself;
- Seven Provinces did nothing deceptive; and
- Seven Provinces made settlement offers of up to $125,000, even though it believed it owed no more than $45,000.

This result is contrary to well-established principles regarding unfair trade practice liability in Massachusetts. *See Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.*, 169 F.3d 43, 56 (1st Cir. 1999); *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47 (1st Cir. 1998); *Ahern v. Scholz*, 85 F.3d 794, 798 (1st Cir. 1996); *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 583 N.E.2d 806, 821 (1991) . The

Court of Appeals' decision is therefore fundamentally unfair, not only to Seven Provinces, but to all similarly situated litigants.

CONCLUSION

This Court should grant Seven Provinces' petition and exercise its supervisory authority to reverse the "follow the settlements equals follow the allocations" ruling of the courts below. This ruling exceeded the courts' Article III authority and unfairly affects all reinsurers and a large number of other litigants. Ultimately, this Court should either reverse the First Circuit's finding that Seven Provinces committed an "unfair or deceptive act or practice" or remand the case to the First Circuit for further proceedings.

Respectfully submitted,

H. Fred Northcraft
Mark V. Dugan
Blackwell Sanders Peper
Martin LLP
Two Pershing Square
2300 Main Street, Suite 1000
Kansas City, Missouri 64108
Telephone: 816-983-8000
Counsel for Petitioner

William Shields
Day, Berry & Howard LLP
Twenty First Floor
260 Franklin Street
Boston, Massachusetts 02110
Telephone: 617-345-4600

(any footnotes trail end of each document)

No. 99-1258

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMERCIAL UNION INSURANCE COMPANY, as Successor in Interest to Employers' Surplus Lines Insurance Company,
Plaintiff, Appellee,

v.

SEVEN PROVINCES INSURANCE COMPANY, LTD.,
Defendant, Appellant.

July 6, 2000, Decided

COUNSEL:
Mark V. Dugan, with whom H. Fred Northcraft, Blackwell Sanders Peper Martin LLP, Jason W. Morgan, and Day, Berry & Howard were on brief, for appellant.

Bruce M. Friedman, with whom Lori M. Meyers, Kroll, Rubin & Fiorella LLP, Rodney S. Dowell, and Berman & Dowell were on brief, for appellee.

JUDGES:
Before Selya, Stahl and Lipez, Circuit Judges. STAHL, Circuit Judge, concurring in part and dissenting in part.

OPINIONBY:
LIPEZ

OPINION:

LIPEZ, Circuit Judge. Seven Provinces Insurance Company, Ltd., appeals from a judgment in favor of the Commercial Union Insurance Company. The district court found for Commercial Union on its claims that Seven Provinces breached a reinsurance contract and committed an unfair trade practice in violation of Massachusetts General Laws Chapter 93A ("93A"). See *Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 9 F. Supp. 2d 49 (D. Mass. 1998)*. We affirm.

I

In the 1960s, Employers' Surplus Lines Insurance Company ("ESLIC") issued several insurance policies to Teledyne, Inc. ("Teledyne"), a California manufacturing company. ESLIC covered a portion of the risk that it faced from one of those policies ("the semiconductor policy") by purchasing a facultative reinsurance certificate from Seven Provinces.[1]

Although the particulars are somewhat more complicated, the facultative reinsurance certificate essentially provided that if Teledyne filed a valid claim with ESLIC under the semiconductor policy for up to $ 450,000 in excess of the first $ 50,000 of loss, Seven Provinces would reimburse ESLIC for half of the covered amount, up to $ 225,000. The policy also contained a "net retention" provision that restricted ESLIC's ability to purchase additional reinsurance to cover the other half of the potential exposure--that is, the remaining $ 225,000 of a $ 450,000 loss:

Being a reinsurance of and warranted same NETT rate, terms and conditions as and to follow the settlements of the EMPLOYERS' SURPLUS LINES INSURANCE COMPANY and that the local office of the said Company retains during the currency of this insurance at least $ 225,000.00 BEING 50% OF $ 450,000.00 EXCESS $ 50,000.00 COMBINED SINGLE LIMIT (subject to

reduction by any general excess loss or excess catastrophe reinsurance whether effected by the head office or local office of the Company) on the identical subject matter and risk and in identically the same proportion on each separate part thereof, but in the event of the retained line being less than as above, [ESLIC's] lines to be proportionally reduced.

In 1982, Teledyne discovered environmental contamination at several of its plants and filed claims with its insurers to cover the resulting liability. In 1993, ESLIC's successor in interest, Commercial Union, settled its share of these claims for $ 2.2 million.[2] After concluding that $ 843,000 of the $ 2.2 million settlement pertained to environmental contamination at the site that was covered by the semiconductor policy, Commercial Union billed Seven Provinces for $ 225,000 as its half of the first $ 450,000 of the loss in excess of $ 50,000. Of the remaining $ 225,000 of the $ 450,000 portion of the loss, Commercial Union billed $ 180,000 to a pool of reinsurers from whom it had purchased quota share treaty reinsurance.

Because Commercial Union could not produce a copy of the reinsurance certificate, Seven Provinces initially questioned whether a reinsurance agreement existed between them at all. Once proof of a reinsurance relationship was discovered, Seven Provinces raised other defenses to coverage, including the argument that by ceding $ 180,000 of its potential exposure through quota share treaty reinsurance rather than retaining its entire share of the risk, Commercial Union violated the net retention provision in the policy.

Frustrated at its inability to obtain redress, Commercial Union filed this lawsuit in May 1995, alleging that Seven Provinces was obligated to provide $ 225,000 in reinsurance coverage and that its conduct constituted an unfair or deceptive business practice under Chapter 93A. After a bench trial, the district court ruled in Commercial Union's favor, finding (1) that Seven Provinces should have provided

coverage; and (2) that its bad-faith conduct in failing to do so violated 93A and warranted the imposition of double damages and attorneys' fees. See *9 F. Supp. 2d at 66, 70.* This appeal followed.

II

Before reaching the merits, we must consider Commercial Union's claim that Seven Provinces' appeal is untimely.

Under Rule 4 of the Federal Rules of Appellate Procedure, "a notice of appeal in a civil case must be filed within thirty days of entry of the judgment or order from which the appeal is taken." See *Piazza v. Aponte Roque, 909 F.2d 35, 38 (1st Cir. 1990).* Commercial Union contends that we lack jurisdiction to hear this case because the district court ruled in its favor on June 15, 1998, and Seven Provinces failed to note its appeal until February 24, 1999. See *Scola v. Beaulieu Wielsbeke, N.V., 131 F.3d 1073, 1074 (1st Cir. 1997)* (observing that the "30-day time limit is mandatory and jurisdictional" (internal quotation marks omitted)).

Generally speaking, appellate review is available only for "final decisions" from the lower federal courts. *28 U.S.C. § 1291.* In all but a few situations, see, e.g., id. § 1292 (granting limited jurisdiction to hear interlocutory appeals); Fed. R. Civ. P. 23(f) (authorizing discretionary appeals of class certification orders), a party cannot initiate an appeal until a "final decision" has been rendered--that is, "'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199, 100 L. Ed. 2d 178, 108 S. Ct. 1717 (1988)* (quoting *Catlin v. United States, 324 U.S. 229, 233, 89 L. Ed. 911, 65 S. Ct. 631 (1945)).* The timeliness of the instant appeal, therefore, turns on whether the district court's entry of judgment on June 15, 1998, constituted a "final decision" within the meaning of § 1291. We conclude that it did not.

Although the district court's entry of judgment resolved most of the issues in the case, its opinion and order specified that there was more to be done before the lawsuit was over. The court reserved jurisdiction to decide "the appropriate date and rate for calculating pre-judgment interest" and ordered the parties to submit further briefs on these issues. Unlike a collateral calculation of costs or attorneys' fees at the end of a case,[3] the determination of when pre-judgment interest began to run required the court to determine when Seven Provinces should have recognized its contractual obligation to provide Commercial Union with reinsurance coverage. Because "these considerations [were] intertwined in a significant way with the merits of [Commercial Union's] primary case as well as the extent of [its] damages," the district court's June 15, 1998 decision to rule in Commercial Union's favor could not be considered a "final decision," and an appeal could not be filed, until pre-judgment interest had been decided. *Osterneck v. Ernst & Whinney, 489 U.S. 169 at 176, 103 L. Ed. 2d 146, 109 S. Ct. 987.*

It was not until October 16, 1998, that the district court ruled on the question of pre-judgment interest and issued an amended judgment that conclusively resolved the merits of the case. Seven Provinces responded by filing a timely motion for reconsideration pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure. The court denied that motion on January 26, 1999, and Seven Provinces noted its appeal within thirty days thereafter, on February 24, 1999. As such, the case is properly before us.

III

On the merits, we must first address the district court's conclusion that Seven Provinces should have provided Commercial Union with reinsurance coverage. The district court's interpretation of the reinsurance agreement requires de novo review. See *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 169 F.3d 43, 49 (1st Cir. 1999).* If the

policy is ambiguous, we must consider the intentions of the parties, see *Marston v. American Employers Ins. Co., 439 F.2d 1035, 1040 (1st Cir. 1971)*, based on the facts as the district court found them, see *United States Liab. Ins. Co. v. Selman, 70 F.3d 684, 687 (1st Cir. 1995)*. We will defer to those factual findings unless they were clearly erroneous. See id.

Under Massachusetts law, Commercial Union had the initial burden to prove that it had suffered a loss within the scope of its reinsurance coverage. See *id. at 688*. This prima facie case was easily established because (1) Commercial Union paid Teledyne $ 2.2 million to settle environmental contamination claims under a number of different insurance policies; and (2) at least a portion of the settlement covered losses under the semiconductor policy that Seven Provinces had agreed to reinsure. Under these circumstances, a threshold basis for reinsurance coverage was sufficiently clear. As a result, Seven Provinces had to raise a valid defense to coverage by, for example, showing that an exclusion in the reinsurance agreement applied or that Commercial Union had failed to fulfill a condition precedent to its recovery under the terms of the policy. See id.

Seven Provinces claimed that its obligation to provide coverage should have been reduced because Commercial Union violated the net retention provision in the reinsurance agreement by ceding part of its share of the potential exposure to quota share treaty reinsurers.[4] More specifically, because Commercial Union had obtained additional reinsurance to cover $ 180,000 of its $ 225,000 share of the risk from the Teledyne semiconductor policy, Seven Provinces sought to have its own liability lowered by the same amount, for a resulting obligation of $ 45,000.

As the district court observed, however, see *9 F. Supp. 2d at 53-54*, the meaning of the net retention provision in the facultative reinsurance certificate was far from clear.

Although the policy called for Seven Provinces' liability to be "proportionally reduced" to the extent that Commercial Union's "local office" retained less than "$ 225,000.00 [of risk] BEING 50% OF $ 450,000.00 EXCESS $ 50,000.00 COMBINED SINGLE LIMIT," it permitted Commercial Union to obtain "general excess loss or excess catastrophe reinsurance whether effected by the head office or local office of the Company" without violating the net retention requirement. In other words, while the policy restricted Commercial Union from using some forms of reinsurance to cover its residual share of the risk of loss, other forms of additional reinsurance were permissible.

The policy attempted to define the types of additional reinsurance that Commercial Union could have without violating the net retention provision--that is, "general excess loss or excess catastrophe reinsurance." Although "excess of loss reinsurance" was a term of art that referred to a particular kind of coverage, the parties acknowledged that "general excess loss or excess catastrophe reinsurance" apparently was not a common term in the industry. See, e.g., Ostrager & Newman, supra, § 15.02-03, at 777-83 (describing various classes and subclasses of reinsurance, including "excess of loss" coverage, without mentioning "general excess loss or excess catastrophe" policies). Under these circumstances, the facultative reinsurance certificate was ambiguous as to whether Commercial Union could use quota share treaty reinsurance to cover its share of the risk of loss or whether doing so would violate the net retention requirement and entitle Seven Provinces to a concomitant reduction in its coverage obligation.

In the face of this ambiguity, the district court properly considered extrinsic evidence to determine what the parties meant by the phrase "general excess loss or excess catastrophe reinsurance." See *Affiliated FM Ins. Co. v. Constitution Reins. Corp., 416 Mass. 839, 626 N.E.2d 878, 881 (Mass. 1994)* ("The primary objective [is] that a contract

is to be construed to reflect the intention of the parties."). Because the policy was several decades old, evidence of the parties' actual intent was unavailable, but each side proffered an expert who worked in the insurance business and could testify to what the terms in the policy must have meant in light of industry practice. See id. ("Where, as here, the contract language is ambiguous, evidence of trade usage is admissible to determine the meaning of the agreement."); cf. *Samuel Hazard's Adm'r v. New England Marine Ins. Co., 33 U.S. 557, 586, 8 L. Ed. 1043 (1834)* ("The terms of the application are to be understood according to the ordinary sense and usage of those terms . . . unless the underwriter knows that a different sense and usage prevail . . . [or] that the [insured] uses the words in a different sense and usage . . . .").

Seven Provinces' expert, Austin Thornton, argued that the phrase "general excess loss or excess catastrophe reinsurance" probably was meant to prohibit Commercial Union from using quota share treaty reinsurance and to permit only the use of additional "excess loss" or "excess catastrophe" coverage. Thornton admitted, however, that reasonable minds could differ on this issue, and Commercial Union's expert, George Gottheimer, took the opposite view of the policy language. Gottheimer explained (1) that industry custom long has permitted treaty reinsurance on a risk insured by a facultative certificate absent unequivocal language to the contrary; (2) that because the facultative certificate only imposed a net retention requirement "on the identical subject matter and risk and in identically the same proportion," it did not preclude the use of a qualitatively different kind of additional coverage such as quota share treaty insurance; and (3) that while the contract was ambiguous, it probably was meant to authorize "general" as well as "excess of loss" reinsurance--in which case the use of quota share treaty reinsurance would have been permissible without triggering a reduction in coverage.

Although the district court acknowledged that Seven Provinces' expert had presented a plausible explanation of what the net retention requirement meant, it found that Commercial Union's expert had provided a more credible interpretation of the relevant language. See *9 F. Supp. 2d at 56.* In support of this finding, the court emphasized that Gottheimer had more extensive experience in the reinsurance industry than Thornton, that his testimony remained consistent on direct and cross-examination, and that Gottheimer explained his reasoning more comprehensively in light of the language of the policy, the principles behind underwriting, and the practices of the industry. See id. The court also explained that Thornton had been involved in this dispute long before it came to court and therefore might have developed a bias in favor of Seven Provinces, while Gottheimer was an outside expert whose relationship with Commercial Union was less entrenched. See id.

In other words, after recognizing the ambiguous language of the facultative reinsurance certificate, and after considering two plausible explanations of what that language meant, the court chose one explanation over another based on its assessment of the credibility of the witnesses. Although Seven Provinces disputes that assessment and has attempted to clarify what its insurance expert was trying to say, we cannot say, after a careful review of the record, that the district court committed clear error in crediting Gottheimer's views over Thornton's and consequently finding for Commercial Union on the issue of coverage. "When the district court's [interpretation of an ambiguous contractual provision] rests not on plain meaning but on . . . extrinsic evidence as to the parties' intent . . . appellate review proceeds under the 'clearly erroneous' standard," *United States Liab., 70 F.3d at 687,* and "where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous," *Anderson v. City*

of Bessemer City, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985).

IV

We must also determine whether the district court erred in concluding that Seven Provinces's conduct constituted an unfair trade practice under Massachusetts law. See Mass. Gen. Laws ch. 93A, § § 2, 11. The district court's factual findings are reviewed for clear error and its conclusions of law are reviewed de novo. See *Arthur D. Little, Inc. v. Dooyang Corp., 147 F.3d 47, 54 (1st Cir. 1998).* "Although whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact, the boundaries of what may qualify for consideration as a c. 93A violation is a question of law." *Schwanbeck v. Federal-Mogul Corp., 31 Mass. App. Ct. 390, 578 N.E.2d 789, 803-04 (Mass. App. Ct. 1991)* (internal citation omitted), rev'd on other grounds, *412 Mass. 703, 592 N.E.2d 1289 (Mass. 1992).*

Chapter 93A proscribes those engaged in trade or commerce from employing "unfair methods of competition and unfair or deceptive acts or practices" in business transactions. Mass. Gen. Laws ch. 93A, § 2. It was "designed to encourage more equitable behavior in the marketplace." *Arthur D. Little, 147 F.3d at 55.* Even so, it "does not contemplate an overly precise standard of ethical or moral behavior. It is the standard of the commercial marketplace." *Ahern v. Scholz, 85 F.3d 774, 798 (1st Cir. 1996).* To trigger liability under 93A, courts have said that the conduct in question "must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce," *Quaker State Oil Ref. Corp. v. Garrity Oil Co., 884 F.2d 1510, 1513 (1st Cir. 1989);* have "an extortionate quality that gives it the rancid flavor of unfairness," *Atkinson v. Rosenthal, 33 Mass. App. Ct. 219, 598 N.E.2d 666, 670 (Mass. App. Ct. 1992);* or fall "'within at least the penumbra of some common-law, statutory, or other

established concept of unfairness' or [be] 'immoral, unethical, oppressive or unscrupulous,'" *Cambridge Plating Co. v. Napco, Inc., 85 F.3d 752, 769 (1st Cir. 1996)* (quoting *PMP Assocs., Inc. v. Globe Newspaper Co., 366 Mass. 593, 321 N.E.2d 915, 917 (Mass. 1975)).* These traditional formulations of the standard for 93A liability are notably imprecise. Indeed, the Massachusetts Supreme Judicial Court has now said that "we view as uninstructive phrases such as 'level of rascality' and 'rancid flavor of unfairness' in deciding questions of unfairness under G.L. c. 93A. We focus on the nature of chalienged conduct and on the purpose and effect of that conduct as the crucial factors in making a G.L. 93A fairness determination." *Massachusetts Employers Ins. Exch. v. Propac-Mass, Inc., 420 Mass. 39, 648 N.E.2d 435, 438 (Mass. 1995)* (internal citations omitted).

A mere breach of contract does not constitute an unfair or deceptive trade practice under 93A, see *Ahern, 85 F.3d at 798,* unless it rises to the level of "commercial extortion" or a similar degree of culpable conduct, *Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 583 N.E.2d 806, 821 (Mass. 1991).* For example, we upheld a finding that a defendant violated 93A by withholding payment and "stringing out the process" with the intent to "force [the plaintiff] into an unfavorable settlement." *Arthur D. Little, 147 F.3d at 55-56.* Similarly, the Massachusetts Appeals Court upheld a finding of 93A liability for extortionate conduct when a defendant raised "specious defenses" to payment and engaged in "foot dragging" and "a pattern of stringing [the plaintiff] along." *Community Builders, Inc. v. Indian Motocycle Assocs., 44 Mass. App. Ct. 537, 692 N.E.2d 964, 978-79 (Mass. App. Ct. 1998).*

An insurance carrier "which in good faith denies a claim of coverage on the basis of a plausible interpretation of its insurance policy is unlikely to have committed a violation of G.L. c. 93A." *Gulezian v. Lincoln Ins. Co., 399 Mass. 606, 506 N.E.2d 123, 127 (Mass. 1987).* But "unlikely" does not

mean "never." The possession of a plausible defense does not automatically preclude a finding of a 93A violation; the defense must be clearly articulated and asserted in good faith. See *Arthur D. Little, 147 F.3d at 56.*

Commercial Union claimed that Seven Provinces violated 93A by its overall pattern of conduct during the period from the submission of the $ 225,000 Teledyne reinsurance bill in August 1993 to the trial in January 1998. The district court concluded that "although Seven Provinces' objections to payment bore the hallmarks of bad faith almost from the outset," *9 F. Supp. 2d at 70,* its conduct was only egregious enough to warrant 93A liability in the period after the facultative reinsurance certificate was discovered in August 1995. On appeal, Seven Provinces argues that it did not violate 93A at any time. Its principal argument is that its interpretation of the net retention provision, discussed above, was plausible, and that this plausible defense shields it from 93A liability.[5] If Seven Provinces had asserted the net retention defense in good faith as the basis for the denial of coverage, it might be right. The detailed factual findings of the district court, however, tell a different story.

In the post-August 1995 period, the court found that Seven Provinces never communicated to Commercial Union a decision to deny coverage. Instead, it engaged in a pattern of "evasiveness and obstructionism," *id. 9 F. Supp. 2d at 63,* without ever refusing to pay. This finding is amply supported by the record, especially the testimony of Seven Provinces's Martin Rebisz, who was in charge of handling Commercial Union's claim. The court specifically found that it "did not find credible Rebisz's denial that Seven Provinces had deliberately avoided coming to a decision on whether to pay CU's bill." *Id. at 64.* This avoidance continued through the trial: "Rebisz evaded the direct issues of whether he believed Seven Provinces was obligated to CU and, if so, for how much." Id. Instead, Rebisz said that Commercial Union could be owed "anything from $ 225,000 to nothing," an answer the

court justifiably found exasperating because "Seven Provinces had at no time since the fac. cert. had been found offered any argument that there was a valid defense to the entire bill." Id. The court also found that "the length of time that has elapsed without Seven Provinces coming to a decision on whether to pay"--almost two and a half years from the discovery of the facultative certificate to the trial--"is far outside normal industry practice," *id. at 65,* which Rebisz admitted is to pay reinsurance claims within ninety days.

The court further found that Seven Provinces pursued its deliberate avoidance strategy by raising a series of "constantly shifting defenses and objections to payment." *Id. at 64.* One of these defenses was Seven Provinces's interpretation of the net retention provision, an interpretation that the court found "plausible." *Id. at 56.* Even under this interpretation, however, Seven Provinces would have owed Commercial Union $ 45,000--an amount that it never paid. Moreover, instead of being asserted as a reason to refuse coverage, this plausible defense was raised along with three others which were not plausible. Foremost among these was a challenge to Commercial Union's allocation of the Teledyne settlement among various sites and policies. Seven Provinces repeatedly demanded explanations of Commercial Union's allocation decisions even though Commercial Union had provided a full and convincing explanation from the start and repeated it consistently. At trial, Seven Provinces devoted much effort to offering alternative allocations of the settlement. The court supportably called this effort "disingenuous," *id. at 64,* noting that under the law of reinsurance the allocation could only be challenged on grounds of bad faith or unreasonableness. Seven Provinces presented "no evidence" of such grounds. *Id. at 60.* In the absence of such evidence, the fact that alternative allocations were "possible," *id. at 59,* was legally irrelevant.

In a variant on its spurious allocation defense, Seven Provinces challenged Commercial Union's failure to allocate any of the settlement to a "difference in conditions" policy it had issued to Teledyne, even though Teledyne had never made a claim on this policy and it was generally understood to be inapplicable to hazardous waste claims. Seven Provinces raised this argument as early as 1995. Despite Commercial Union's clear explanations, Rebisz continued to raise it up to and including the time of trial --not, the court's findings suggest, with any prospect of success (Seven Provinces's own expert dismissed the argument), but as one more aspect of the "moving target" strategy. *Id. at 64.*

Perhaps the most egregious manifestation of this obstructionist strategy occurred when Seven Provinces claimed for the first time at trial that coverage for the underlying hazardous waste claim was barred by the "owned property" exclusion in the Teledyne policy. This argument was plainly barred by the "follow the settlements" doctrine that was written into the facultative certificate. Its use at trial was further confirmation of Seven Provinces's bad-faith pattern of constantly shifting objections to payment. On this point, as on all aspects of the moving target strategy, the district court's factual findings are well-supported by the record, including the testimony at trial and the voluminous correspondence between the parties.[6]

The district court further found that Seven Provinces's strategy of constantly shifting defenses was intended to pressure Commercial Union into a settlement. "I find that Seven Provinces' intent in its dealings with CU was to delay and object to payment so that CU would compromise the Teledyne bill and agree to a global commutation of all the business between the parties." *Id. at 65.* Since the "global commutation" was only pressed before August 1995, it could not be a substantive basis for 93A liability because of the court's determination that 93A liability was only warranted for Seven Provinces's conduct after the discovery of the

facultative reinsurance certificate. Nevertheless, the court was entitled to rely on evidence of Seven Provinces's bad faith in the period before the facultative certificate was found in assessing its intentions thereafter. Moreover, Seven Provinces's attempts to force a settlement of the Teledyne bill continued after August 1995, even to the time of trial. The court's findings about Seven Provinces's intent were based in large part on the testimony of its own witnesses. "Thornton testified that the purpose of presenting the alternative allocations to CU was strategic: to lead to a negotiated compromise." *Id. at 59-60.* "Rebisz maintained that Seven Provinces was not refusing to pay, but merely would prefer to mediate or arbitrate in an attempt to compromise the bill." *Id. at 64.*[7]

Having concluded that the district court's 93A findings are not clearly erroneous, we must next determine if those findings are legally sufficient to support the imposition of 93A liability. As noted, a 93A fairness determination focuses on the nature, purpose, and effect of the challenged conduct. See *Mass. Employers Ins. Exch., 648 N.E.2d at 438.* Seven Provinces's conduct was unfair in nature--raising a series of constantly shifting defenses while never coming to a decision about coverage; in purpose--to force a settlement of Commercial Union's claim regardless of its merits; and in effect--causing, at great expense to Commercial Union, a delay of over three years from discovery of the facultative certificate to final judgment (and over five years from the initial billing).[8]

"We emphasize that this case did not involve a good faith dispute over billing or a simple breach of contract, each of which is an insufficient basis for 93A liability." *Arthur D. Little, 147 F.3d at 55.* We emphasize, too, that this case did not involve a party whose only miscue was to decide (incorrectly, as matters turned out) to let the courts resolve a good faith disagreement or to rely mistakenly on faulty legal argumentation. Instead, Seven Provinces's conduct--raising

multiple, shifting defenses (many of them insubstantial) in a lengthy pattern of foot-dragging and stringing Commercial Union along, with the intent (as its own witnesses admitted) of pressuring Commercial Union to compromise its claim--had the extortionate quality that marks a 93A violation.[9]

Importantly, Seven Provinces's actions also fell within an "established concept of unfairness." *Cambridge Plating Co., 85 F.3d at 769.* As the district court explained, reinsurance relationships are governed by the traditional principle of "utmost good faith" ("uberrima fides"). See *9 F. Supp. 2d at 69;* see also *Compagnie de Reassurance D'Ile de France v. New England Reins. Corp., 57 F.3d 56, 72 (1st Cir. 1995).* "Utmost good faith . . . requires a reinsurer to indemnify its cedent for losses that are even arguably within the scope of the coverage reinsured, and not to refuse to pay merely because there may be another reasonable interpretation of the parties' obligations under which the reinsurer could avoid payment." *United Fire & Cas. Co. v. Arkwright Mut. Ins. Co., 53 F. Supp. 2d 632, 642 (S.D.N.Y. 1999)* (citing *Christiania Gen. Ins. v. Great Am. Ins. Co., 979 F.2d 268, 280-81 (2d Cir. 1992));* see also *White v. Western Title Ins. Co., 40 Cal. 3d 870, 710 P.2d 309, 316-17, 221 Cal. Rptr. 509 (Cal. 1985)* (holding that fiduciary relationship between insurer and insured does not terminate when litigation commences). The court noted that Commercial Union's expert "testified to the traditional mores of the industry: that reinsurance is 'an honorable engagement,' in which 'gentlemen's agreements' were secured by a handshake. Under this view, the reinsurer and the reinsured are 'partners,' who owe each other a duty of 'utmost good faith.'" *9 F. Supp. 2d at 69.* Viewed in light of the exacting standard of uberrima fides, Seven Provinces's bad faith tactics were wholly alien to the usual course of dealings between an insurer and a reinsurer, and thus were even more clearly removed from an ordinary breach of contract. The district court did not err in

concluding that these tactics to avoid reinsurance liability were "unfair" within the meaning of 93A.

Affirmed.

CONCURBY:
STAHL (In Part)

DISSENTBY:
STAHL (In Part)

DISSENT:

STAHL, Circuit Judge, concurring in part and dissenting in part. Although I agree with the majority that this appeal is properly before us, see ante Part II, and that Seven Provinces should have provided Commercial Union with reinsurance coverage, see ante Part III, I believe that the district court erred in finding that Seven Provinces' conduct warranted liability under 93A. Thus, with respect to Part IV of the majority opinion, I respectfully dissent.

Massachusetts courts have held, without fail, that Chapter 93A does not apply to a mere breach of contract. See *Ahern v. Scholz, 85 F.3d 774, 798 (1st Cir. 1996)* (citing *Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc., 754 F.2d 10, 18 (1st Cir. 1985))*. In the context of insurance, while a carrier may not stubbornly refuse to pay a claim once liability has become "reasonably clear," it can continue to deny coverage based upon a "plausible interpretation" of a policy without violating 93 *A. Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 169 F.3d 43, 56 & n.23 (1st Cir. 1999).* The assertion of a reasonable defense to coverage does not constitute an unfair settlement practice even if the basis for that defense turns out to be wrong. See *Premier Ins. Co. v. Furtado, 428 Mass. 507, 703 N.E.2d 208, 210 (Mass. 1998).*

With these considerations in mind, let us examine the facts as the district court found them. The court predicated the imposition of 93A liability on Seven Provinces' purported pattern of delay in handling Commercial Union's claim for coverage. The court observed, for example, that upon receiving an initial demand for coverage in August, 1993, a "pattern quickly developed by which [Commercial Union] would seek payment . . . and Seven Provinces would respond only after some delay, and then by requesting further information." *Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 9 F. Supp. 2d 49, 60 (D. Mass. 1998).* But then, after criticizing Seven Provinces' conduct since August, 1993, the district court concluded that 93A liability was unwarranted until after August, 1995. This inconsistency -- between the period of time for which the court assailed the company's conduct, see *id. at 65* ("Seven Provinces has delayed payment for over four years after receiving the bill, and over two years since locating the [facultative reinsurance certificate]." (emphasis added)), and the period of time for which the court actually found a 93A violation to have occurred -- requires us to scrutinize the 93A ruling.

Between August, 1993 and August, 1995, Seven Provinces was entitled to question its obligation to provide reinsurance coverage because the very existence of a reinsurance relationship was unclear. As the district court acknowledged, Seven Provinces had "legitimate reasons" to doubt whether a reinsurance relationship actually existed at all. *Id. at 70.* By the time the facultative reinsurance certificate was found, litigation already was underway and Seven Provinces was entitled to raise any reasonable defenses to coverage that emerged from the terms of the policy. Among these defenses, Seven Provinces argued (1) that Commercial Union's allocation of liability among its Teledyne policies inflated the amount of loss that this particular reinsurance agreement covered, and (2) that Commercial Union's use of quota share treaty reinsurance

violated the net retention requirement in the facultative reinsurance certificate. The district court conceded that these defenses were, respectively, "possible," see *id. at 59,* and "plausible," see *id. at 56.*

While it is true that Seven Provinces' attorney asked about another defense to coverage for the first time at trial, he did so only in the form of a single question about an "owned property" exclusion in one of the insurance policies. This question did not delay the proceedings because the court curtailed the inquiry. When the issue briefly resurfaced later on in the trial, Commercial Union did not object and the court did not intervene. There may be litigation strategies that are so abusive as to warrant 93A liability, but there is no authority for grounding 93A liability on an attorney's decision "to test the waters" briefly when a new issue emerges during the six-day trial of a complicated case.

In any event, Seven Provinces' insurance expert, Austin Thornton, was prepared to testify and in fact did testify in support of the company's defenses to coverage. Armed with that expert advice, the company proceeded on the reasonable belief that its liability genuinely was unclear. See *Ferrara & DiMercurio, Inc., 169 F.3d at 56* ("Insurers are both encouraged and entitled to rely . . . on the advice of expert consultants in evaluating liability [on a demand for coverage]."); see also *Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass. 671, 448 N.E.2d 357, 361-62 (Mass. 1983).* Although these defenses to coverage may have taken time to litigate, and although none of these defenses ultimately prevailed, the record simply does not suggest that Seven Provinces acted with the kind of culpability that 93A requires. See *Cambridge Plating Co. v. Napco, Inc., 85 F.3d 752, 769 (1st Cir. 1996).*

The majority takes a different view, suggesting that as soon as the facultative reinsurance certificate was found, Seven Provinces should have paid Commercial Union's claim

in full rather than continuing to raise new issues and questions. In particular, the majority contends that it was normatively unfair for Seven Provinces to demand additional documentation and to ask for further explanations once the existence of a reinsurance relationship was established. But if anything, the discovery of the facultative reinsurance certificate reasonably justified some delay on Seven Provinces' part because once the certificate was found, the company was entitled to pause in order to determine whether any other defenses to coverage appeared from the language of the certificate or from the factual circumstances surrounding the claim.

The majority cites no authority -- and I know of none -- to support the proposition that a reinsurer must provide coverage in full, without delay, and without limitation, simply because some kind of policy has been found. If that were the law, an insurer could face 93A liability whenever it assumed coverage pursuant to a "reservation of rights" letter rather than waiving its defenses from the onset. But that is not the law. Although the reinsurance industry holds itself to high standards of conduct that weigh in favor of coverage under the policy in a doubtful case, those standards do not justify liability under 93A simply because a reinsurer pauses to uncover and to raise a variety of "plausible" and "possible" defenses to coverage. Moreover, while it is true that Massachusetts courts might permit 93A liability when a plaintiff initiates litigation solely to burden another, see *Schubach v. Household Fin. Corp., 375 Mass. 133, 376 N.E.2d 140, 142 (Mass. 1978)* (suggesting that a finance company might violate 93A by suing debtors in distant jurisdictions so that they would be more likely to default), they have stopped short of saying that a defendant risks 93A liability simply because it raises a vigorous defense that fails to succeed on the merits. The district court erred in imposing liability under 93A.

Setting aside the facts of this particular case, what troubles me most about the majority's approach is that it truly has no bounds. Although the majority opinion says that "there is a line . . . that divides run-of-the-mill negotiating tactics from those that border upon the extortionate," it offers no indication of where the line should be drawn when imposing 93A liability for conduct during litigation. Every commercial litigant appearing in federal court in Massachusetts must now fear that if it raises plausible defenses against a debatable claim rather than agreeing to pay the claim at the outset, it will risk 93A liability simply because it chose to fight and lost. Massachusetts law has never reached that far.

For the foregoing reasons, I respectfully dissent with respect to Part IV of the majority opinion.

----------Footnotes----------

[1] "Reinsurance is a contractual arrangement whereby one insurer . . . transfers all or a portion of the risk it underwrites . . . to another insurer . . . ." Barry R. Ostrager & Thomas R. Newman, Handbook on Ins. Coverage Disputes § 15.01[a], at 776 (9th ed. 1998). Whereas facultative reinsurance covers the risk that an insurer bears with respect to a specific policy, treaty reinsurance cedes the risks that an insurer carries on any number of policies within a designated line of its underwriting business. See id. § 15.03[a], at 780-81.

[2] As a matter of convenience, we will refer to Commercial Union instead of to its predecessor in interest, ESLIC.

[3] In an earlier case, we likened the determination of pre-judgment interest to the taxation of costs, the award of attorneys' fees, and other collateral orders that do not affect the finality of a judgment for the purposes of appeal. See *Alman v. Taunton Sportswear Mfg. Corp., 857 F.2d 840, 844 n.4 (1st Cir. 1988).* Since then, the Supreme Court has indicated that pre-judgment interest actually "serves to 'remedy the injury giving rise to the [underlying] action,' . . . and in that sense is part of the merits of the district court's decision." *Osterneck v. Ernst & Whinney, 489 U.S. 169, 176 n.3, 103 L. Ed. 2d 146, 109 S. Ct. 987 (1989)* (quoting *Budinich, 486 U.S. at 200)* (alteration in original). Even if our opinion in Alman remains valid in other respects, the Osterneck decision more closely controls the issue at hand and makes clear that the district court's June 15, 1998, ruling was not a "final decision" within the meaning of *28 U.S.C. § 1291.*

[4] Although Seven Provinces raised other defenses to coverage before the district court, as we explain below in

connection with the 93A claim, it only presses the net retention issue on appeal.

[5] Seven Provinces also argues that it cannot be held liable under 93A because the case was in litigation from May 1995 onwards, i.e., for the entire period after the facultative certificate was discovered in August 1995. This contention is without merit. It is settled law that conduct during litigation can constitute a 93A violation. See *Schubach v. Household Finance Corp., 375 Mass. 133, 376 N.E.2d 140, 141-42 (Mass. 1978);* see also *Refuse & Envtl. Sys., Inc. v. Industrial Servs. of America, Inc., 932 F.2d 37, 43 (1st Cir. 1991)* (stating that "bringing [a] lawsuit in spite of the evidence" can be a 93A violation).

[6] Nor are the court's findings regarding Seven Provinces's shifting defenses undermined by the fact that its expert, Austin Thornton, testified in support of some of those defenses. As the court pointed out, Thornton's credibility was suspect because he was involved in the case since early 1995 and hardly qualified as impartial. See *9 F. Supp. 2d at 56.* It is one thing to rely in good faith on the advice of outside consultants; it is quite another to suggest that an insurer insulates itself from 93A liability merely because a hired expert maps its battle plan.

[7] To be sure, we understand that negotiations are part and parcel of the settlement of insurance claims. In most instances, negotiations--even hard-line negotiations--will not subject a party to 93A liability. There is a line, however, that divides run-of-the-mill negotiating tactics from those that border upon the extortionate. The evidence of a pattern of evasiveness and the district court's well-documented findings place Seven Provinces's tactics on the "wrong" side of this line.

[8] Commercial Union's attorneys' fees of $ 234,702.08, as awarded by the district court under 93A, exceeded its $ 225,000 reinsurance claim. If 93A recovery were denied,

therefore, Commercial Union would suffer a net loss from having brought a meritorious claim.

[9] From this discussion it should be clear that we do not suggest, as the dissent says we do, that Seven Provinces was obligated to pay Commercial Union's claim in full as soon as the facultative certificate was found. Seven Provinces was obligated, however, to deal with Commercial Union in good faith. The district court supportably found, as detailed above, that Seven Provinces's course of conduct after August 1995 was marked by bad faith. It is only by ignoring these findings--in particular, the finding that Seven Provinces never communicated to Commercial Union a decision to deny coverage--that the dissent can conclude that the court erred in imposing 93A liability.

----------End Footnotes----------

C.A. NO. 95-10894-NG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

COMMERCIAL UNION INSURANCE COMPANY, As Successor in Interest to Employers' Surplus Lines Insurance Company, Plaintiff,

v.

SEVEN PROVINCES INSURANCE COMPANY, LTD., Defendant.

June 15, 1998, Decided

DISPOSITION:
Judgment entered for plaintiff in amount of $ 450,000.

COUNSEL:
For COMMERCIAL UNION INSURANCE COMPANY, Plaintiff: Bruce M. Friedman, Kroll & Tract, New York, NY.

For COMMERCIAL UNION INSURANCE COMPANY, Plaintiff: Thomas J. Hogan, Kroll, Rubin & Fiorella LLP, Boston, MA.

For SEVEN PROVINCES INSURANCE COMPANY, LTD, Defendant: Brian A. Davis, Kurt Wm. Hemr, Choate, Hall & Stewart, Boston, MA.

For SEVEN PROVINCES INSURANCE COMPANY, LTD, Defendant: H. Northcraft, Mark V. Dugan, Blackwell, Sanders, Matheny, Weary & Lobardi P.C., Kansas City, MI.

JUDGES:

NANCY GERTNER, U.S.D.J.

OPINIONBY:
NANCY GERTNER

MEMORANDUM

June 15, 1998

A trial was held in this action to recover on a policy of reinsurance. The dispute arises out of a reinsurance arrangement entered into thirty-five years ago between Employers' Surplus Lines Insurance Company ("ESLIC") and defendant Seven Provinces Insurance Company, Ltd. ("Seven Provinces"). ESLIC insured Teledyne, a California-based manufacturing company, through a number of different insurance policies. In 1963, ESLIC ceded a portion of the Teledyne risk covered by one of those policies to Seven Provinces.

In 1982, environmental contamination was discovered at a number of Teledyne sites. The company was faced with third-party suits and Environmental Protection Agency ("EPA") claims for millions of dollars in clean-up costs. It submitted a claim to its insurers, including ESLIC's successor-in-interest, plaintiff Commercial Union ("CU"). CU's obligations to Teledyne under various policies and for various contaminated sites were litigated in California and eventually settled. Under the terms of the settlement, CU paid Teledyne $ 2.2 million and Teledyne released CU from all future liability for any environmental claims against Teledyne.

OPINION:

According to CU, one site in particular was the focus of negotiations: the "semiconductor site," where Teledyne had carried on manufacturing activity since 1962, and for which

clean-up costs were estimated to be $ 20.93 million. ESLIC had insured Teledyne the year after the site began operations, from July 1, 1963 to July 1, 1964, under a general liability policy that covered losses in excess of $ 50,000 and up to $ 1.95 million. CU allocated $ 843,000 of the $ 2.2 million to that site and billed its reinsurers accordingly. All loss in excess of $ 500,000 was covered by a reinsurer not a party to this case. Of the remaining $ 450,000, CU billed half, or $ 225,000, to Seven Provinces. It then billed $ 180,000 of its half of the risk to a pool of treaty reinsurers, leaving CU itself to absorb only $ 45,000 of the loss.[1]

CU brings this suit in order to recover the $ 225,000 it billed Seven Provinces, as well as damages and attorneys fees under Mass. Gen. L. ch. 93A, for Seven Provinces' failure to satisfy this claim for over four years. CU bases its claim for $ 225,000 in reinsurance on its internal records of the reinsurance relationship between the parties and on the facultative certificate[2] ("fac. cert.") formalizing that relationship. It bases its claim for 93A damages in part on the unique mores of the industry, notably the obligation of "uberrimae fidei," the obligation to act with utmost good faith. See Compagnie de Reassurance de l' *Ile de France v. New England Reinsurance Corp., 944 F. Supp. 986, 992-94 (D. Mass. 1996).*

Seven Provinces raises several defenses to this claim. (1) The net retention claim: Seven Provinces argues primarily that the facultative certificate links its reinsurance obligation to the amount of risk ESLIC (now Commercial Union) retained. Because $ 180,000 of ESLIC's $ 225,000 portion of the Teledyne risk was covered by a pool of treaty reinsurers, Seven Provinces' obligation was reduced by equal measure, to $ 45,000. (2) The allocation claim: Seven Provinces has also raised a range of challenges to CU's decision to allocate $ 843,000 of the $ 2.2 million Teledyne settlement to the semiconductor site: that it was not done in good faith; that it wrongly billed reinsurers for ex gratia payments, not required

by the insurance policies that had been settled, but instead given voluntarily in order to obtain the general release from all future claims; that it failed to allocate any payments to a "difference in conditions" -- essentially, property damage -- policy ESLIC had issued to Teledyne; and that the entirety of Teledyne's claim against CU was barred by the "owned property" exclusion in the ESLIC-Teledyne policy reinsured by Seven Provinces. (3) The 93A Claim: Seven Provinces argues in part that the mores of the reinsurance industry have changes and its behavior conforms to 1990s standards.

The Court heard six days of testimony and admitted numerous pages of exhibits documenting the relationship between the parties and between CU, ESLIC, and Teledyne. Specifically, several years of correspondence between the parties about the Teledyne claim were authenticated and made part of the record. Each side offered the testimony of the officers directly involved in this dispute, as well as of an expert in the customs and practices of the highly specialized world of reinsurance.

This memorandum provides my findings of fact and conclusions of law in my resolution of all of CU's claims against Seven Provinces.

I. FINDINGS OF FACT

A. The Formation of the Reinsurance Relationship

The background to the formation of the reinsurance relationship between Seven Provinces and ESLIC is undisputed. During the early 1960s, both ESLIC and Seven Provinces operated in California through a managing general agent, Sayre & Toso. Sayre & Toso was authorized to write insurance and reinsurance business for ESLIC, Seven Provinces, and several other insurance companies. On October 29, 1963, it wrote a policy of reinsurance between ESLIC and Seven Provinces, memorializing that relationship

in a facultative certificate, # SP016069. The facultative certificate was made up of a series of numbered, standardized forms. The first page of the certificate was a Seven Provinces' form and the number beginning "SP" indicates "Seven Provinces," making Seven Provinces technically the drafter of the agreement.

By the terms of the facultative certificate, the reinsurance relationship with Seven Provinces covered the ESLIC policy with Teledyne, policy # E506432, for the same period as the underlying policy, from July 1, 1963 to July 1, 1964, and on the same risks. The ESLIC policy with Teledyne was a general liability policy, covering risks in excess of $ 50,000 and up to $ 1,950,000. As a liability policy, it excluded coverage for damage to property owned by Teledyne. ESLIC had obtained reinsurance for all losses above $ 500,000 from another reinsurer, listed as "Brandt" in CU's records.[3] Of the remaining $ 450, 000 of risk it retained, ESLIC ceded $ 225,000 to Seven Provinces. Thus, by the express terms of the facultative certificate, Seven Provinces agreed that should Teledyne make a claim against ESLIC for $ 450,0000 under the ESLIC-Teledyne liability policy, Seven Provinces would in effect reimburse ESLIC for half its loss.

However, Seven Provinces' obligation was not unconditional; it was qualified by a "net retention" provision. After setting out the amount of reinsurance and the nature of the risk reinsured, the last page of the certificate contained the following paragraph 2:

[1] Being a reinsurance of and warranted same **NETT**[4] rate, terms and conditions as and to follow the settlements of the **EMPLOYER SURPLUS LINES INSURANCE COMPANY** and that the local office of the said Company retains during the currency of this insurance at least **$ 225,000.00 BEING 50% OF $ 450,000.00 EXCESS $ 50,000.00 COMBINED SINGLE LIMIT** ([2] subject to

reduction by any general excess loss or excess catastrophe reinsurance whether effected by the head office or local office of the Company) [3] on the identical subject matter and risk and in identically the same proportion on each separate part thereof, but [4] in the event of the retained line being less than as above, Underwriter's lines to be proportionally reduced.[5]

This clause, it is agreed, required the "local office" to retain for ESLIC's account 50% of the Teledyne risk covered by the ESLIC-Seven Provinces policy, and ceded the other 50% to Seven Provinces. Whether it restricted ESLIC's head office at all, and if so, in what ways, is at the heart of this dispute. Seven Provinces claims that this clause required ESLIC to retain the entirety of its 50% of the Teledyne risk for its own account. If it reduced its risk by obtaining any further reinsurance, Seven Provinces' responsibility under the contract would be proportionately reduced as well. Because CU admits that $ 180,000 of the Teledyne risk was covered by a treaty reinsurance pool, Seven Provinces argues that its liability is also reduced by $ 180,000. It now owes CU $ 45,000, at the most.

CU argues that this clause bound only the "local office" or its functional equivalent, ESLIC's managing general agent Sayre & Toso. Only if Sayre & Toso obtained facultative reinsurance on the ESLIC-Seven Provinces policy, it argues, would Seven Provinces' responsibility be reduced. If the ESLIC's main office obtained facultative reinsurance, or if either office obtained treaty reinsurance, Seven Provinces' responsibility would remain the same: the $ 225,000 CU is seeking in this action.

B. The Net Retention Clause

I find that a reinsurance relationship existed between the parties. It is documented in the facultative certificate, which is of undisputed authenticity.

I find that the express terms of the facultative certificate provided for the cession of $ 225,000 of the Teledyne risk to Seven Provinces.

I find that the language of paragraph two is ambiguous at several key points:

(1) Does the phrase "being a reinsurance of and warranted same NETT rate, terms and conditions as and to follow the settlements of [ESLIC] and that the local office . . . retains . . . at least $ 225,000 . . ." (phrase [1]) contain a warranty as to the amount of risk ESLIC agreed to retain, or did the phrase address something else, namely, that the "NETT rate, terms, and conditions" of the reinsurance relationship would be the same as that of the underlying insurance policy between ESLIC and Teledyne? Put otherwise, does the warranty clause in any way guarantee the amount of risk ESLIC would retain?

(2) When the clause refers in phrase [2] to the reinsurance ESLIC was permitted to obtain, which types of reinsurance are covered? Do the words "any general excess loss or excess catastrophe reinsurance" include treaty reinsurance, the kind ELSIC actually obtained?

(3) Does the parenthetical phrase at [2], that the retained amount is "subject to reduction," create an exception to the proportional reduction provision at [4], such that any reduction in ESLIC's retained risk by means of "general excess loss or excess catastrophe reinsurance" did not affect Seven Provinces' obligations? Or, alternatively, does it list forms of reinsurance that, while they would not constitute a breach of the net retention warranty, nonetheless, by reducing the retained line to an amount less than "as above," trigger the proportional reduction provision?

These ambiguities could not be resolved at trial through testimony from the parties who entered into the agreement. Although each party testified to the meaning of the relevant

provisions, neither was able to call or even identify the Sayre & Toso agent who drafted this agreement thirty-five years ago. Sayre & Toso itself has since gone out of business.

I do not find it appropriate to construe all of the ambiguities in the document against the drafter. Although the first page of the certificate bears the name of Seven Provinces, both parties acknowledged that the certificate was made up of a series of standardized forms routinely used by Sayre & Toso, who was at the time the agent of each.[6] As CU's expert, Dr. Robert Gottheimer, testified, the separate pages could have been drafted by any one of the several companies Sayre & Toso represented. Only the sections in bold and capital letters were completed at the time the relationship was formed, and they do not contain any of the language that is in dispute.

Given the ambiguity of the fac. cert. language, and the lack of any witnesses to the formation of the agreement, each side offered expert testimony interpreting the agreement in the light of the custom and practice of the reinsurance industry. CU offered the testimony of Dr. Robert Gottheimer ("Gottheimer"), a professor at the College of Insurance in New York who has been working in the insurance industry since 1953 and in reinsurance since 1964. Seven Provinces offered that of Austin Thornton ("Thornton"), who has worked in the insurance industry since 1975 and has published an article on the perils of CERCLA liability claims.

1. Gottheimer's testimony

Gottheimer testified that the facultative certificate did not restrict ESLIC's right to obtain treaty reinsurance. The "warranty" phrase [1], he explained, only warranted the policy's "rates, terms, and conditions," not the net retention figure. With respect to the net retention language ([2] and [4]), he offered three linguistic explanations of why it did not provide for the reduction of Seven Provinces' obligations in the event that ESLIC obtained treaty reinsurance. First,

because the custom and practice of the industry has long been for the reinsured to have the right to obtain treaty reinsurance on a facultatively reinsured risk, industry practice is to use unequivocal language when an absolute bar on such additional reinsurance is intended. The customary language to indicate such an absolute bar would have included the phrase "absolute net," a statement that "only" a particular kind of treaty reinsurance, such as excess loss, was allowed, or a description of the risk as "not reinsured in any other way." None of that language appears here.

Second, Gottheimer testified that the proportional reduction provision could only refer to facultative reinsurance because it refers to insurance "on the identical subject matter and risk and in identically the same proportion."[3] Treaty reinsurance by definition covers an entire class of the reinsured's business, all of its liability insurance, for example, or all of its earthquake insurance. Only facultative insurance, which reinsures one particular risk, can be "on the identical risk."

Third and finally, Gottheimer testified that the parenthetical at [2] ("general excess loss or excess catastrophe reinsurance"), which purports to describe the allowable types of reinsurance, while unusual, most likely includes treaty reinsurance. He testified that it reflects British and European rather than United States usage, according to which the phrase "general reinsurance" refers to treaty reinsurance. He acknowledged that the punctuation of the phrase -- without a comma between "general" and "excess loss" -- appeared to refer to "general excess loss" and "general excess catastrophe" reinsurance, not to "general reinsurance, excess loss reinsurance, and excess catastrophe reinsurance." Nonetheless, he believed that the reference to general reinsurance, however configured, could only be a reference to treaty reinsurance.

Gottheimer reinforced his textual interpretation with a policy explanation. A net retention provision, he explained, is meant to create an incentive for the underwriter to investigate carefully the business it writes. A reinsurer does not itself evaluate the quality of the risk it is reinsuring. Instead, it must rely on the reinsured's underwriting judgment. If the reinsured could cede all of the risk to reinsurers, it would have no incentive to exercise that judgment carefully, because it would bear none of the consequences of underwriting bad risks. These incentives simply do not apply, however, when the reinsurance in question is treaty reinsurance. In that case, the reinsurance covers an entire class of business and cannot affect the incentives to evaluate any particular risk carefully.

Finally, Gottheimer testified that the separate functions of the local agent and the head office raise a practical barrier to the drafting of a facultative certificate that would reduce the reinsurer's obligation if the head office carried treaty reinsurance. Neither side to the formation of the facultative relationship at the local level would be likely to know of or have control over the conclusion of quota share treaties by the head office. Neither side, at the local level, would be likely to know the absolute amount retained. In this case, for example, it was undisputed that, while the facultative certificate was issued in October 1963, the relevant treaty reinsurance was already in effect several years before. I find it hardly likely that such uncertain obligations would have been entered into as a matter of course, using a pre-printed form such as in this case. Gottheimer's interpretation makes sense; the local office only negotiated concerning the facultative reinsurance that it would obtain, not the treaty reinsurance the head office entered into.

2. Thornton's Testimony Compared

The defendant offered the testimony of Austin Thornton, a claims director at Munich American Services Corporation

with twenty-three years' experience in the insurance business. Thornton acknowledged that reasonable minds could differ as to the meaning of the retention clause in this case, but his interpretation was that ESLIC was prohibited from obtaining quota share reinsurance. "General excess loss or excess catastrophe reinsurance," he maintained, meant only "excess loss" or "excess catastrophe" reinsurance, not treaty reinsurance. Therefore, treaty reinsurance was barred, or, at a minimum, if ESLIC obtained treaty reinsurance, Seven Provinces' obligations would be reduced accordingly.

Thornton also argued that the phrase "the local office . . . retains" required Sayre & Toso to maintain $ 225,000 for its own account. This provision, he testified, was also breached. Sayre & Toso, it was undisputed, was not a local office of ESLIC, but a managing general agent. As it was no more than a broker, it was incapable of retaining risk for its own account.

This second argument was implausible on its face. As Gottheimer testified uncontested, for reasons of state law, a number of insurers, including Seven Provinces itself, operated through managing general agents during this period in the development of the American insurance market. To maintain that this warranty provision required that such managing general agents act as local offices and maintain risk for their own account, rather than for the account of the principles they represented, would make all of the facultative certificates entered into by Sayre & Toso on this standardized Seven Provinces form incapable of performance ab initio. I decline to accept such an absurd result.

I find, moreover, that the policies behind net retention agreements would not be jeopardized by allowing managing general agents to enter into facultative reinsurance contracts, even if they were not legally configured so as to be able to retain risk for their own account. Acting as ESLIC's agent, Sayre & Toso retained the risk on behalf of ESLIC. The

probity of its underwriting decision would directly impact ESLIC's profits. The incentive to underwrite carefully would be maintained both by its general duties to ESLIC under agency law and, more particularly, by the industry practice, testified to by Gottheimer, of linking an agent's commission to the principal's profits.

On the issue of which types of reinsurance were permitted by the net retention clause, both Thornton's and Gottheimer's explanations were plausible. Overall, I found Gottheimer to be more credible. His explanation of the relevant language was detailed and consistent on both direct and cross examination. It accounted for all aspects of paragraph two, both in terms of the paragraph's internal logic, and in the context of reinsurance industry custom, practice, and policy. Thornton's explanation was less comprehensive; it failed to take into account, for example, the policy reasons behind treating facultative and treaty reinsurance differently, or the language referring to insurance on "the identical subject matter and risk and in identically the same proportion . . . ."

I also found Gottheimer's testimony more credible because of the extensive experience on which it was based. Gottheimer has been writing reinsurance contracts for thirty years; in fact, he was the only witness in this case who was active in the industry at the time the contract in question was formed. Although he worked in America, his experience encompassed placing business in British and global markets. He has been teaching principles of reinsurance for over twenty-five years, and has published two texts and a number of articles on reinsurance matters. One chapter in one of the texts he has written is devoted entirely to drafting facultative certificates. Gottheimer holds numerous degrees in insurance, beginning with a 1958 B.A. as an insurance major and including both a PhD in management with a focus on insurance and a specialized reinsurance degree completed as recently as 1991. He has held a number of positions in

insurance industry associations over the past fifteen years and acted as an arbitrator in over 40 insurance disputes.

Austin Thornton's experience in the insurance and reinsurance industry, although not insubstantial, does not nearly approach that of Gottheimer. His insurance industry experience goes back to 1975, two decades after Gottheimer began in the business. His experience also lies almost exclusively in claims adjustment, rather than underwriting. Thus, while Gottheimer has participated for decades in the drafting of hundreds of contracts such as the one at issue here, Thornton's experience is less relevant to questions of contract formation and interpretation. Nor does Thornton share a fraction of Gottheimer's teaching, writing, educational, or industry leadership experience.

Finally, I found Gottheimer's testimony credible because of his impartiality. Although a frequent expert witness on insurance and reinsurance matters, his only connection to this dispute is as an outside expert. When questioned on cross-examination about any possible ties to the plaintiffs, he acknowledged that he had been involved in litigation with the plaintiff's counsel before -- but on the opposite side. Thornton, by contrast, has been intimately involved in this dispute since early 1995, when he was hired as a consultant by Martin Rebisz ("Rebisz"), the Seven Provinces officer in charge of handling this claim. He accompanied Rebisz to CU's Boston offices to inspect CU's files, and he participated with him in meetings with CU officers and employees. Following that meeting, Thornton drafted critiques of CU's allocation that Rebisz submitted to CU in an attempt to persuade it to reduce its claim. As Rebisz testified, Thornton's employer, Munich American, has an important ongoing relationship with Seven Provinces' parent company, ING Insurance.

3. Summary of Fact-Findings on Net Retention

I find that the facultative certificate only provided for Seven Provinces' portion of the Teledyne risk to be reduced if ESLIC obtained facultative reinsurance on its portion of the risk. I find that the facultative certificate allowed ESLIC to carry treaty reinsurance that would cover its portion of the Teledyne risk.

Given my finding that CU was allowed to obtain treaty reinsurance, I do not need to reach the issue -- vigorously argued by the parties -- of whether the restrictions in the facultative certificate covered only Sayre & Toso, leaving CU the freedom to obtain any type of reinsurance it chose. As CU was permitted to obtain the type of reinsurance it did, without any corresponding reduction in Seven Provinces' obligations, that issue is irrelevant.

I therefore find that Seven Provinces' obligation under the reinsurance relationship with ESLIC was not reduced by the existence of the CU treaty reinsurance pool.

C. Seven Provinces' Challenge to CU's Allocation of the Teledyne Settlement

1. The Allocation

Seven Provinces also challenges CU's decision to allocate $ 843,000 of the $ 2.2 million settlement to the semiconductor site and to the 1963-1964 policy year. Generally, it argues that other allocations between the various Teledyne sites and the policies that covered them would have been "more reasonable." In addition, it argues that part of the settlement should have been allocated to a "difference in conditions" policy between ESLIC and Teledyne, and that CU should not have paid Teledyne for its environmental liability because such losses were excluded from coverage by the underlying Teledyne-ESLIC policy's "owned property exclusion."

To explain the allocation of the Teledyne settlement among the ESLIC-Teledyne policies, CU offered the

testimony of the two employees directly responsible for making that allocation: James J. McKay ("McKay"), an employee in the ceded (or reinsurance) department and Bryan Drees ("Drees"), his supervisor. Drees' handwritten notes, which he authenticated at trial, show that he had identified three relevant ESLIC-Teledyne policies[7] in CU's records: E-506432, the 1963-64 policy at issue in this case, E-63854, which covered the period November 1, 1970 to November 1, 1971, and policy E-61904, which ran from March 15, 1970 to November 1, 1972. The terms of policy E-506432 have been described in detail above. On policy E-63854, ESLIC was the primary insurer, covering the first $ 500,000 in the first year and the first $ 50,000 in excess of $ 50,000 in the second. Policy E-61904 covered only losses in excess of $ 1 million dollars, with ESLIC's total liability limited to the next $ 1 million.

Drees' notes set out all of the insurers and reinsurers on each policy. On the 1963 policy, Drees' notes reflect CU records identifying four reinsurers and distributing the risk as follows: after the first $ 50,000 was paid by a primary insurer, the next $ 450,000 would be split equally between ESLIC and Seven Provinces; the next $ 500,000 in excess of $ 450,000 (that is, any losses between $ 500,000 and $ 1 million) would be paid by Brandt; and the last $ 1 million between $ 950,000 and ESLIC's ceiling of $ 1.95 million was divided between two reinsurers, Security Mutual and Employers Mutual, each of which reinsured $ 500,000. The notes also reveal that Security Mutual had been "liquidated years ago." Although CU did not possess the fac. cert. memorializing the reinsurance relationship with Seven Provinces, Drees relied on a card in CU's internal records, which listed the fac. cert. numbers and terms of all the reinsurance on the Teledyne policy. Drees recognized the card as a typical Sayre & Toso record.

There was also a "difference in conditions" policy between Teledyne and ESLIC, but CU did not allocate any

settlement dollars to it because Teledyne had never presented it to CU for coverage. CU understood it to be inapplicable to the hazardous waste claim in any case, because it covered depreciation to Teledyne's property, buildings, or machinery, not general liability.

McKay and Drees explained in detail how they allocated the $ 2.2 million settlement between policies E-506432 and E-63854 according to their standard allocation procedures. First, Drees wrote to John Frumer ("Frumer"), CU's in-house counsel who had negotiated the settlement, requesting: "(1) the settlement amount (2) the allocation of settlement $ $ $ to the various sites and the logic driving such allocation (3) explanatory note regarding $$ allocated to 'buy-back,' if applicable." As Drees and McKay explained, they believed that the only legitimate manner in which to allocate settlement dollars between policies and sites was to follow the logic of the actual settlement negotiations with the insured.

Frumer responded that seven sites had driven the settlement and two policies would be impacted. The release, he reported was a "throw in" for which no money had been exchanged. Although Drees conceded on cross-examination that a release "always has value," he added that that value cannot always be translated into monetary terms. He insisted that in allocating no settlement dollars to the release he was following Frumer's account of the actual value CU and Teledyne had assigned to the release in the course of negotiations.

McKay received this information and proceeded to allocate the entire $ 2.2 million settlement among ESLIC policies and their reinsurers. Because fixing the date of loss is normally difficult in a hazardous waste claim, he assumed that the loss could have occurred in its entirety within any one-year policy period.[8] The total settlement dollars were then divided between the seven key sites according to the

percentage of Teledyne's total clean-up costs that they represented. Only one site was in operation in 1963, so only that site's losses were allocated to the policy that Seven Provinces had reinsured. That was the semiconductor site, the most polluted of all Teledyne's sites, with an estimated clean-up cost of $ 20.93 million. Because this represented 38.32% of Teledyne's entire clean-up costs, 38.32% of the settlement amount was allocated to that site, for a total of $ 843,040. Of that amount, the first $ 450,000 was split between ESLIC and Seven Provinces under the reinsurance agreement, with the remaining $ 393,040 allocated to Brandt under the excess of $ 500,000 reinsurance contract. ESLIC's $ 225,000 was in turn billed to a quota share treaty pool in which CU retained 20% of the risk. If CU had been able to identify Brandt, it would have been left with a loss of only $ 45,000 on the 1963-64 policy.

Six other sites had been operating during 1970 and 1971 and were therefore covered by policy E63854. The remaining $ 1,356,960 of the settlement was divided between those six sites, again according to the percentage of Teledyne's total clean-up costs each represented. The calculations were careful and detailed, with each site accorded a specific value ranging from $ 100,100 to $ 592,240. The total was billed to the 100% reinsurer on those sites, Agency Managers.

CU later returned the $ 1.3 million to Agency Managers, after it pointed out to McKay that if Teledyne's $ 20 million in losses were spread out evenly over the 20 year period in question, in no single year would the loss have been in excess of $ 1 million. Thus, ESLIC's coverage obligations under the excess of $ 1 million policies would never have been triggered, and no settlement money should have been attributed to those policies.[9]

2. Evidence of Bad Faith or Unreasonableness

CU offered contemporaneous written records of the allocation decision, reiterated and explained by McKay and

Drees at trial, as evidence that the Teledyne allocation was done in good faith according to their usual settlement allocation procedures in hazardous waste claims. Seven Provinces responded by attempting to draw inferences of bad faith from discrepancies in CU's records and admissions by Drees and McKay on the witness stand. It later concluded its case with Thornton's expert testimony as to alternative methods of allocation.

Seven Provinces pointed out that CU's records are inconsistent as to how many sites were involved in the Teledyne settlement, and at what loss to CU. In his first notice to reinsurers of the claim in February 1993, Drees wrote that "I understand that there are approximately twelve sites in all, two or three of which are of major import." A CU Senior Executive Claims Advisory, prepared for CU's management in April 1993, listed the two main sites, the Semiconductor site and the Wah Chang site, and projected CU's liability as $ 1.95 million for the first and only $ 250,000 for the second.[10] The Settlement Agreement itself lists twenty-two sites.

McKay and Drees, however, explained each of these discrepancies in a manner consistent with their overall testimony. Drees' February letter and the Senior Executive summary, they explained, were merely preliminary and general descriptions of the claim meant to alert the reinsurers and CU management, respectively, of pending liability. They were not meant as detailed accountings. As for the difference between the twenty-two sites settled and the seven to which monies were allocated, McKay stated that settlements of large and complex environmental claims are normally driven by the few most polluted sites; it was to these key sites that he allocated the ultimate settlement amount. I found this testimony to be logical, consistent, and credible.

Seven Provinces' counsel tried to suggest to McKay and Drees that the allocation was a bad faith attempt to minimize

CU's exposure by allocating the settlement dollars to policies on which there was available reinsurance. McKay directly denied that the allocation was affected by the existence of solvent reinsurers or the identity of the reinsurer on any particular policy, and Seven Provinces could offer no evidence to contradict him. Seven Provinces' counsel tried to elicit from both McKay and Drees that, having made a mistake that required CU to return $ 1.3 million to Agency Managers, CU was all the more determined to recover the full $ 225,000 from Seven Provinces. Both men denied such motivation, which, in any case, would be irrelevant to the reasonableness or accuracy of the Seven Provinces allocation, made at the same time as the Agency Managers allocation and long before the Agency Managers' mistake was discovered.

Seven Provinces also offered the testimony of Thornton on alternative allocations, attempting to show that the allocation was commercially unreasonable. Thornton testified that the allocation encompassed too few Teledyne sites. Instead of the twenty-two sites CU and Teledyne mentioned in their settlement agreement, the allocation should have taken into account thirty-five sites at which the EPA had identified Teledyne as a potential polluter. The reason for going beyond the settlement, he explained, was that CU had obtained a global release from Teledyne. Hence, all potential future liability on Teleydne's part should have been considered.

In addition, Thornton considered the effect on Teledyne's liability if certain other variables were altered, such as whether other polluters might have been identified at any of these sites. Finally, Thornton used a different method for allocating the total clean-up costs per site per year. In place of CU's method of apportioning the settlement among the sites according to their share of Teledyne's total $ 20.93 million clean-up costs, Thornton aggregated all of the clean-

up costs for all of the sites and allocated that total according to each year of each site's operation.

Although Thornton's testimony established that other allocations were possible, I did not find it conclusive proof that CU's allocation was unreasonable. Were the allocation entirely unacceptable, Seven Provinces could have brought a declaratory judgment action to establish that fact, but it never did. Indeed, Thornton testified that the purpose of presenting the alternative allocations to CU was strategic: to lead to a negotiated compromise.

3. Summary of Fact-Findings on Allocation Issue

I find that CU's allocation of settlement dollars to the seven most important sites that drove the settlement was reasonable. I find that it was also reasonable to allocate the settlement total according to the percentage of Teledyne's total clean-up liability that each site represented. I was not persuaded that CU should have allocated settlement dollars to sites that were never even discussed in the settlement.

I find that there was no evidence of bad faith or unreasonableness in CU's allocation of settlement monies between its policies with Teledyne.

I find that there is no evidence that CU allocated the settlement among policies so as to maximize its reinsurance recovery, or that its allocation was in any other way affected by the existence of reinsurance.

I find that there is no evidence that any portion of the settlement figure was an ex gratia payment made in exchange for the environmental release.

I find that CU was not obligated to allocate settlement dollars to sites identified by the EPA but not within the settlement CU actually reached with Teledyne.

D. The 93A Claim

1. The History of CU's Claims Submission

a. 1993-1994 Communications

CU's 93A claim is based on Seven Provinces' protracted failure to pay the claims submission CU sent it on August 26, 1993. As the correspondence between the parties was authenticated by both sides and admitted at trial, the following account draws on that correspondence as well as on the trial testimony.

On February 4, 1993, Drees wrote to all reinsurers on the Teledyne policies, alerting them that a hazardous waste claim had been made by Teledyne and a settlement was being negotiated. Attached to the letter was a copy of a CU internal spreadsheet showing the existence of the Seven Provinces reinsurance.

On August 16, 1993, McKay advised Seven Provinces of the settlement, and on Drees' advice he also sent the letter to Seven Provinces' counsel, Fred Northcraft ("Northcraft"), two days later. He then sent Northcraft the official bill for the Teledyne reinsurance on August 26, 1993, accompanied by a cover letter explaining the legal and mathematical calculations underlying the allocation as well as charts setting out the policy numbers for all CU-Teledyne policies, the Seven Provinces facultative certificate number, and a list of each of the seven sites and the percentage of the settlement dollars allocated to that site. The letter also stated that, according to the counsel who had negotiated the settlement, the environmental release was a "throw in" for which no settlement dollars had been paid.

The initial bill did not include a copy of the facultative certificate. CU itself did not have a copy of the fac. cert. in its files, but Drees assumed that Sayre & Toso would have sent a copy to the reinsurer at the time it was drafted. Drees did not know whether Sayre and Toso would have also sent a copy to ESLIC or CU as part of its normal practice. In fact, as Rebisz testified, Seven Provinces did not have a copy of the fac. cert. in its files, nor was this reinsurance relationship listed in its

partial index of business written by Sayre & Toso. This was not surprising, as Rebisz testified that only 200-300 of the estimated 5,000-30,000 policies Sayre & Toso had written for Seven Provinces were listed in the index. In fact, it was more likely than not, he testified, that Seven Provinces would not have a copy of the fac. cert. when a Sayre & Toso claim was filed.

McKay followed up with several phone calls to Northcraft. On August 30, 1993, Seven Provinces responded by requesting more information. A pattern quickly developed by which CU would seek payment from Seven Provinces and Seven Provinces would respond only after some delay, and then by requesting further information. Once CU provided that information, Seven Provinces would come back with a new and different question.

In September of 1993, Northcraft told McKay he would get back to CU soon about the billing, and that his client might seek a commutation of all outstanding reinsurance relationships with CU. In October, McKay left a series of messages for Northcraft, which Northcraft did not return. Frustrated by what he saw as an unusual reluctance to pay, McKay referred the matter to Drees, his supervisor. McKay testified that he had never dealt with a reinsurer who was so reluctant for so long to acknowledge the existence of a reinsurance relationship.

In November of 1993, Northcraft requested another copy of the August billing and supporting documentation. McKay sent that information again, along with a copy of CU's evidence of the reinsurance relationship, a Sayre & Toso record listing the Teledyne policy number (E506432), and the amount of reinsurance and the facultative certificate number for each reinsurance relationship. The relevant line clearly lists both the amount of reinsurance ($ 225,000) and the facultative certificate number "SP016069." The "% of

reinsurance" column has some information scratched out, but "50% of 450" is clearly legible.

In early December, after several months of messages and brief and inconclusive conversations with Northcraft, Drees called Seven Provinces in the Hague directly. He was told that Martin Rebisz was the person familiar with the claim, and that Rebisz would call him back within a few days. Instead, the next communication from Seven Provinces was a letter from Northcraft, asking for more information on the existence of the reinsurance relationship and justification for the allocation decision. He stated that Seven Provinces could find no evidence in their own files of the relationship. He also protested on several grounds that Seven Provinces was being asked to pay 25% of the total settlement allocated to the semi-conductor site, pointing out that Seven Provinces had covered only one year out of thirty years of Teledyne operations and CU had other, later policies with Teledyne. This response neither acknowledged nor responded to the detailed explanation of the allocation that McKay had already provided in August. As he had in September, Northcraft raised an unrelated matter, Seven Provinces' desire to settle all of its reinsurance relationships with CU, most of them involving workers compensation claims. He suggested that all of these matters be settled together.

McKay wrote to Seven Provinces again in January, explaining that if the $ 20 million clean-up cost for the semiconductor site was spread out over 20 years, the annual exposure would be $ 1 million dollars. As CU had issued one year of coverage that could have been impacted by the semiconductor site, it could fairly have expected to pay at least $ 1 million towards the 20 year clean-up costs. It therefore felt that $ 843,000 represented a fair settlement. Northcraft responded with more questions. He misdescribed the allocation explanation he had been given, treating the $ 2.2 million settlement as a settlement between Teledyne and all of its insurers, rather than just with CU, and treating the

settlement figure as if it were Teledyne's actual loss figure. He then raised two new questions: how had the settlement been allocated among the 20 years of coverage, and was Seven Provinces the only reinsurer in 1963-64. He also mischaracterized the evidence of the reinsurance relationship that CU had sent from its files as merely CU's "statement about the policy and its terms," and reported that Seven Provinces was "hesitant" to make the payment without further proof. He concluded by again asking for a global commutation of all CU-Seven Provinces business.

b. The February 1995 Visit

In February 1995, Rebisz and Thornton visited CU's Boston offices to examine the files and meet with CU officers about the claim. Rebisz and Thornton were provided with all of CU's relevant files and with a room in which to inspect them unsupervised. They inspected them for approximately four hours, but, relying on CU's promise to provide them with any copies they needed, they did not take the time to read all of the documents in detail. Instead, they tabbed several documents which CU agreed to copy and send them. One fact made an impression on Rebisz and reinforced his doubts as to whether the reinsurance relationship described in the Sayre & Toso records was still in force: the fac. cert. number in the Sayre and Toso records was "SP016069," but CU's copy of the Teledyne policy carried a handwritten note, "C/R [carries reinsurance] SP015949."

The two sides then met to discuss the claim, with Rebisz and Thornton representing Seven Provinces and McKay, Drees, Harvey Lewis ("Lewis"), and Frumer from CU. Frumer was there to explain the settlement to Rebisz and Thornton, as he had personally finalized the deal. Although Drees described the meeting as "cordial," McKay left the meeting early, angry at what seemed to him to be another Seven Provinces delaying tactic.

In the course of the discussion, Lewis mentioned that CU had retrieved a number of Sayre & Toso documents from a warehouse in California. On this point, the parties' recollections differ sharply. Rebisz remembers that Lewis refused to tell him where the warehouse was, but Drees and McKay testified that Lewis told him that to the best of his knowledge, that warehouse had been shut down. Drees added that Rebisz and Lewis discussed the possibility of joint efforts to locate where any remaining files might have been moved, and Drees asked Rebisz to let CU know if Seven Provinces discovered the location of another warehouse with Sayre & Toso records. I found Drees and McKay more credible on this point. By February 1995, it was in CU's interest to give Seven Provinces all the information it needed to decide to pay their bill. That, indeed, was the purpose of Rebisz' visit to Boston, during which, both sides agreed, Rebisz and Thornton had unrestricted access to CU files.

Towards the end of the meeting, CU requested a signed confidentiality agreement from Rebisz in exchange for copies of the documents. As Drees and McKay explained, although they would have had a duty to provide any relevant evidence to a reinsurer, Seven Provinces had not yet acknowledged that it was a reinsurer. Rebisz testified that he assented in principle to the confidentiality agreement, and left Boston believing the documents would soon be sent to him.

A week after the Boston meeting, however, McKay wrote to Northcraft, explaining that absent some acknowledgement from Seven Provinces that it was, in fact, the reinsurer, it would not release the claims documents from Teledyne without a signed confidentiality agreement. Although CU recognized its fiduciary duty to release all documents to a reinsurer, it did not have such a duty to someone who was not a reinsurer. With that letter, McKay sent copies of all of CU's underwriting materials regarding the Teledyne risk, including several Sayre & Toso forms, the facultative certificates with the other reinsurers, Employer's Mutual and Security Mutual,

and the underlying policy between Teledyne and ESLIC.[11] McKay testified that CU was not concerned that their demand for a confidentiality agreement would delay Seven Provinces' investigation, as payment had already been delayed for two years.

McKay and Northcraft spoke a few days later. Northcraft was still reluctant to acknowledge the reinsurance relationship; the closest he would come was an offer to state that Seven Provinces was "more likely than not" the reinsurer. Rebisz testified that this reflected his belief at the time. Northcraft's next offer was to recognize the reinsurance relationship in exchange for information about the location of the Sayre & Toso warehouse. McKay responded that CU believed that Seven Provinces already had sufficient information to determine whether the relationship existed and that, as to the warehouse, Lewis had already told Rebisz that the warehouse to which he had referred at the meeting was no longer in existence.

Over the next few months, the parties continued in a stalemate. CU demanded an acknowledgment of the reinsurance relationship and stated that until it had that acknowledgment it would not hand over claims information, which it believed was in any case irrelevant to Seven Provinces' obligation to pay. Seven Provinces responded that there was a "good possibility" that Seven Provinces was the reinsurer, yet at the same time it decried the sparsity of CU's records and refused to acknowledge the relationship until it had obtained all "reasonably available information." Seven Provinces continued to demand the claims information (which would not have revealed anything about the existence of the relationship) and the location of the warehouse (which CU had already stated was closed). In May 1995, CU filed this suit.

c. August 1995: Locating the Certificate

By August 11, 1995, Seven Provinces had finally located the fac. cert. It contained exactly the terms, and the policy number, listed in the Sayre & Toso records CU had sent to Seven Provinces two years before. Yet rather than acknowledging that the reinsurance relationship had been proven and settling the litigation, Seven Provinces continued to raise new issues and questions. In October 1995, for example, Rebisz wrote to Drees, asking why the quota share treaty "does not apply . . . and why part of the Teledyne settlement would not be recoverable from your Quota Share reinsurers." He also questioned why no money was allocated to the difference in conditions policy. He even raised, at that late date, the issue of CU's initial decision that its policies with Teledyne covered hazardous waste claims, although conceding that "it would appear that under the terms of the policy, denial of coverage for the environmental claims would be hard to justify."

Drees refused to respond to these questions, except by demanding payment. He testified that he was "baffled" by these requests, because he believed that Seven Provinces had enough information to decide whether to pay the bill. He could see no relevance in the actual quota share treaty, or in the difference in conditions policy.

Seven Provinces' next step was to offer $ 25,000, which Rebisz described in one sentence as "a fair resolution of your claim" and in the next as an "interim payment, pending receipt of further documentation." After consulting with CU's litigation counsel, Drees wrote to Rebisz rejecting this offer and demanding full payment.

Drees explained, and Rebisz concurred, that it was not unusual in the industry for a reinsurer to pay the full amount billed, reserving rights to recover it should the bill turn out to be incorrect. Drees also felt $ 25,000 was "woefully inadequate" even as an interim payment, given that over two years had passed since the billing. Instead, he took the

opportunity to demand that Seven Provinces identify which issues were still unresolved. Not surprisingly, given the confusion caused by Seven Provinces' constantly shifting questions, Drees misunderstood Seven Provinces' remaining objections: he failed to mention the dispute over allocation which took up several days of trial testimony, because in October 1995 he thought it had already been resolved.

In 1996, Seven Provinces began taking a new approach. Now in possession of proof of the reinsurance relationship, it demanded a host of documentation, including a "certified copy" of the quota share treaty, further justification of the allocation decisions, accounts receivable documenting all other amounts CU had been paid by any other insurers on the Teledyne claim, "documentation" of why the quota share treaty and the difference on conditions policy were not applicable, and "all in/external reinsurance 'lay-offs'," a demand it acknowledged would have to be negotiated before it would be reasonable or workable. It repeatedly demanded further explanations of the allocation decision, which it now characterized as "a departure from and in contradiction to the underlying 'global settlement' with Teledyne." It also began to offer alternative allocation "models" developed by Thornton.

2. Summary of Conclusions on 93A

CU, through the testimony of McKay and Drees, described this history as one of its sincere and dogged attempts to collect on its August 1993 claims submission, and Seven Provinces' evasiveness and obstructionism. On behalf of Seven Provinces, Rebisz described it as at worst an unfortunate cross-cultural misunderstanding. At first, he explained, Seven Provinces was merely concerned about finding more evidence of the reinsurance relationship before paying such a large claim on such an old agreement. Rebisz testified that he had only once paid a claim without finding the fac. cert., and then only under court order. He also

expressed concerns about whether the relationship had been cancelled between 1963 and 1993, an issue he had not raised in his correspondence with CU prior to trial and which does not seem to be related to the absence of the fac. cert. but merely the age of the claim.

After the fac. cert. was found, Rebisz explained, Seven Provinces' further requests for information and challenges to the coverage, settlement, and allocation decisions were merely the normal investigations that every reinsurer is entitled to conduct. At all times, he maintained, Seven Provinces was willing to compromise the claim. It was CU that was withholding documents and the location of the Sayre & Toso warehouse.

I found McKay and Drees credible. They described in consistent detail an allocation and collection procedure that was reasonable and customary. They openly admitted that they became increasingly frustrated with Seven Provinces and distrustful of its purpose in requesting ever new and different information from their files. I found credible their explanation of the occasions on which they hesitated or refused to provide further documentation or justifications of their bill.

I did not find Rebisz credible. He was evasive on the stand, often refusing to answer direct questions about the facts of the case, responding instead with generalized assertions about his usual behavior in handling reinsurance claims or explanations of his understanding of reinsurance industry practice in general. On the central fact of when he saw the fac. cert. for the first time, Rebisz could not remember a single date or detail.

I did not find credible Rebisz's denial that Seven Provinces had deliberately avoided coming to a decision on whether to pay CU's bill. Disingenuously, Rebisz attempted to disclaim any responsibility for the delay in responding to CU's bill by stating that the first billing sent to the Hague

must have been lost in the mail, so that he had not found out about CU's billing or seen any proof of the reinsurance relationship until July 1994. He acted as if he could not be charged with the knowledge of his lawyers, who had received the bill and supporting documentation immediately in early August 1993. In a similarly evasive vein, Rebisz repeatedly complained of the few instances on which CU had withheld information (the Teledyne claims documents and the location of the defunct warehouse) as if this excused all of Seven Provinces' own logically and factually unrelated dilatory tactics.

Throughout his testimony, Rebisz evaded the direct issues of whether he believed Seven Provinces was obligated to CU and, if so, for how much. When I asked him how much he believed Seven Provinces owed CU, now that he had obtained the fac. cert. that proved the existence of the reinsurance obligation, he replied, anywhere from the full amount of $ 225,000 to $ 45,000, the figure that would reflect his interpretation of the net retention clause. He then corrected his answer, to anything from $ 225,000 to nothing, even though Seven Provinces had at no time since the fac. cert. had been found offered any argument that there was a valid defense to the entire bill. Yet at the same time Rebisz maintained that Seven Provinces was not refusing to pay, but merely would prefer to mediate or arbitrate in an attempt to compromise the bill. Companies of the stature of CU and Seven Provinces' parent company ING, he stated, should be able to work out some fair commercial settlement of the claim without recourse to litigation.

Rebisz pointed to two circumstances that would have given a reinsurer some concern about the CU billing: first, the apparent non-existence of the fac. cert., and second, the discrepancy between the fac. cert. number in the Sayre & Toso records and the number handwritten on CU's copy of the Teledyne policy. Nonetheless, these two facts cannot account for the variety and multiplicity of Seven Provinces'

objections to the billing. Rebisz's own testimony at trial presented a moving target in keeping with the Seven Provinces' record of constantly shifting defenses and objections to payment. One moment, he testified that he had never reached a decision on whether CU's allocation was unreasonable. The next moment, he testified that the allocation was not up to generally accepted standards, indeed, "way out of line," because it allocated no money to the release and considered too few Teledyne sites. At trial, he expressed an ongoing concern that the reinsurance relationship might have been cancelled or amended some time after 1963, a concern that he did not express in any of his correspondence with CU prior to trial and which his counsel did not introduce into this litigation.

Likewise, Rebisz raised again on the stand defenses to payment that had long been resolved and that were, in any case, ineffective as a mater of law. For example, he expressed continuing doubts about Seven Provinces' duty to pay CU, based on CU's failure to allocate settlement dollars to the difference in conditions policy, in spite of CU's clear statement, supported by documentation, that Teledyne had made no claim on that policy and it was considered inapplicable to hazardous waste claims under United States insurance law. He expressed doubts on the stand that the underlying CU policy even covered Teledyne's hazardous waste liability, because of the "owned property" exclusion, in spite of having written to CU in October 1995 that "under the terms of the policy, denial of coverage for the environmental problem at issue might be hard to justify," and in spite of the fact that such challenges to the basic coverage decision are barred, as Rebisz acknowledged, by the doctrine of "follow the settlements,"[12] a doctrine which is expressly incorporated into the fac. cert.

Seven Provinces' counsel participated in this "moving target" strategy even at trial, raising the "owned property exclusion" issue on the second day of trial, without ever

having raised it at any time during the two years of litigation. I found Seven Provinces' considerable evidence of alternative possible allocations equally disingenuous. After conceding on the first day of trial that the law barred any challenges to allocation except those based on bad faith or ex gratia payments, Seven Provinces endeavored at length to convince the Court that the CU allocation was unreasonable.

I find that the length of time that has elapsed without Seven Provinces coming to a decision on whether to pay is far outside normal industry practice. Rebisz admitted on the stand that he was aware of American rules penalizing a reinsured if it does not collect on a claims submission within ninety days by reducing the amount of surplus available to write new business. Yet Seven Provinces has delayed payment for over four years after receiving the bill, and over two years since locating the fac. cert.

I find that Seven Provinces' numerous and constantly shifting requests for information from CU represented an attempt to evade payment of its reinsurance obligations. Not only does the record of correspondence between the parties reflect that Seven Provinces' objections to payment were frequently changing, but Seven Provinces' behavior at trial continued in this pattern.

I find that Seven Provinces' intent in its dealings with CU was to delay and object to payment so that CU would compromise the Teledyne bill and agree to a global commutation of all of the business between the parties.

II. CONCLUSIONS OF LAW

A. Seven Provinces' Obligations Under The Facultative Certificate

1. The Terms of the Facultative Certificate

Unambiguous contracts must be enforced according to their terms, *Somerset Sav. Bank v. Chicago Title Ins. Co., 420*

Mass. 422, 649 N.E.2d 1123, 1127 (Mass. 1995), yet here I found the terms of the fac. cert. to be ambiguous. In construing this ambiguous language, I must view the fac. cert. as a coherent whole, considering "every phrase and clause . . . [in light of] all the other phraseology contained in the instrument, which must be considered as a workable and harmonious means for carrying out and effectuating the intent of the parties." *Boston Edison Co. v. F.E.R.C., 856 F.2d 361, 365 (1st Cir. 1988)* (quoting *J.A. Sullivan Corp. v. Commonwealth, 397 Mass. 789, 494 N.E.2d 374, 378 (1986))*. Custom and usage may "aid in policy interpretation, not as tending to contradict or vary a contract, but on the theory that usage forms part of the contract." Id.; citing *Affiliated FM Ins. Co. v. Constitution Reinsurance Corp., 416 Mass. 839, 626 N.E.2d 878, 881-82 (Mass. 1994);* Restatement (Second) of Contracts § 222 comment (b) 882 (1981).

Having found that the language of the fac. cert. was ambiguous, I heard testimony from experts on both sides as to its best interpretation in light of custom and practice in the reinsurance industry. As explained more fully above, I found the explanation advanced by Gottheimer more credible and persuasive, both because of his greater knowledge of and in depth explanation of industry custom and practice and because his interpretation made compelling sense of the disputed provision as a whole. Therefore, I conclude that, under the terms of the fac. cert., Seven Provinces had an obligation to reimburse CU for $ 225,000 of its loss on the Teledyne claim. I also conclude that that obligation was not reduced by the existence of treaty reinsurance. I conclude that Seven Provinces' liability under the terms of the contract between the parties is $ 225,000.

2. CU's Allocation of the Teledyne Settlement

Two separate but related doctrines govern the legal effect of Seven Provinces' challenges to CU's allocation of the

Teledyne settlement. The "follow the fortunes" doctrine requires reinsurers to accept a reinsured's good faith decision that a particular loss is covered by the terms of the underlying policy, while the "follow the settlements" doctrine requires reinsurers to abide by a reinsured's good faith decision to settle, rather than litigate, claims on that policy. As Gottheimer testified, the reinsurer "must go along with however the insurer settles the claim." Both doctrines have been long established by law in the reinsurance industry, and the "follow the settlements" doctrine is, in addition, incorporated explicitly into the fac. cert. in this case.

a. Seven Provinces' Challenges to CU's Coverage and Settlement Decisions

The "follow the settlements" doctrine requires the reinsurer to cover settlements made by the reinsured, as long as they are not fraudulent, collusive, or made in bad faith. *Aetna Casualty & Sur. Co. v. Home Ins. Co., 882 F. Supp. 1328, 1346 (S.D.N.Y. 1995).* The reinsurer bears the burden of showing bad faith on the reinsurer's part. The standard is a high one: the reinsurer must show "gross negligence or recklessness," *North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194 (3d Cir. 1995),* or that the settlement was not even "arguably" within the scope of the reinsurance coverage. *Mentor Ins. Co. (U.K.) v. Norges Brannkasse, 996 F.2d 506 (2d Cir. 1993).* The reinsurer cannot dispute good faith determinations that a risk was covered by the underlying insurance policy, *Christiania Gen. Ins. Corp. v. Great Am. Ins. Co., 979 F.2d 268, 280 (2d Cir. 1993),* or good faith interpretations of policy terms. *International Surplus Lines Ins. Co. v. Fireman's Fund Co., 998 F.2d 504 (7th Cir. 1993); Aetna, 882 F. Supp. at 1347.* The reasonableness of the reinsured's judgment is to be determined as of the time of settlement. *Aetna, 882 F. Supp. at 1351.*

The purpose of the "follow the settlements" doctrine is to prevent the reinsurer from second-guessing the good faith

settlement decisions of the ceding company. *Aetna, 882 F. Supp. at 1346.* If the ceding company knew that its settlement decisions could be challenged by every reinsurer, there would be little incentive to settle with the insured. The costs and risks of litigation avoided by settling with the insured would only be revived at the reinsurance stage. "The goals of maximum coverage and settlement that have been long established would give way to a proliferation of litigation." *International Surplus Lines Ins. Co. v. Certain Underwriters & Underwriting Syndicates at Lloyd's of London, 868 F. Supp. 917, 921 (S.D. Ohio 1994).*

Seven Provinces has been unable to produce any evidence of bad faith or fraud on CU's part in its decisions about whether Teledyne's environmental liability was covered by the general liability policy E-506432, in spite of the "owned property" exclusion emphasized by Seven Provinces' counsel, and whether and for how much to settle such liability. Nor did it produce any such evidence with regard to CU's assessment that Teledyne's losses were not covered by the difference in conditions policy.

In fact, Seven Provinces did not offer any testimony from the officers or agents of CU who made these decisions. McKay and Drees both testified unrebutted that they allocated CU's liability between sites, policies, and reinsurers after the coverage and settlement decisions had been made. This is not surprising, as both are employed in CU's reinsurance (or "ceded") department; Seven Provinces called no witnesses from CU's claims department who might have been able to testify to the bona fides of the claims decisions. Indeed, when confronted with Seven Provinces' "owned property exclusion" argument, Drees replied that such matters of claims interpretation were outside his area of expertise. He suggested that Seven Provinces should have raised that issue with the claims people they met during their February 1995 visit to CU's offices. Thus, I conclude that Seven Provinces' challenge to CU's coverage and settlement

decisions fails for lack of any evidence of the required elements of bad faith, fraud, or unreasonableness.

In addition, I conclude that Seven Provinces' challenge to the coverage decision based on the "owned property exclusion" is meritless as a matter of law.[13] "Owned property" exclusions are meant to exclude coverage for damage to the insured's property, a kind of loss that is normally covered by a property insurance policy, not a liability policy. They have been raised numerous times as defenses to insurance coverage of liability for releases of hazardous waste by the insured onto its own property. The vast majority of courts that have considered the issue, however, have rejected the argument that Seven Provinces is making here on the grounds that contamination of the environment should be understood as damage to the rights of the public, the sovereign, and other third parties, rather than as damage to the particular insured property on which the contamination first occurs. More pragmatically, the losses for which an environmental contaminator seeks insurance coverage are rarely the depreciation in value of the property; it is almost always, as here, the costs of clean-up demanded by the government -- on its face more like liability than property damage. See *Intel Corp. v. Hartford Accident and Indem. Co., 952 F.2d 1551, 1565 (9th Cir. 1991); Patz v. St. Paul Fire & Marine Ins. Co., 15 F.3d 699, 704 (7th Cir. 1994); Chemical Applications Co. v. Home Indem. Co., 425 F. Supp. 777, 779 (D.Mass. 1977); Township of Gloucester v. Maryland Casualty Co., 668 F. Supp. 394, 400 (D.N.J. 1987); AIU Ins. Co. v. Superior Court, 51 Cal. 3d 807, 799 P.2d 1253, 1279-1289, 274 Cal. Rptr. 820 (Cal. 1990);* 4 Susan M. Cooke & Christopher P. Davis, The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § § 19.05 [3][d], 19-140 (1994 and 1997 Supp.).

b. Seven Provinces' Challenge to the Allocation

Seven Provinces attempts to avoid the effect of the "follow the settlements" doctrine by arguing that what it is challenging is the good faith of the allocation, rather than of the settlement. This is a distinction without a difference. In the first place, a number of attacks it launches on CU's allocation are in actuality attacks on the settlement. CU's judgment that the loss was not excluded by the "owned property exclusion" or covered by the "difference in conditions" policy goes to the heart of its decisions on which policies covered the loss and should be settled rather than litigated.

Secondly, the attempt to distinguish settlement from allocation would undermine the entire "follow the settlements" doctrine. In practical terms, the determination of which among several policies covers which particular loss among many is not much different from the more general decision that the losses are covered by the policies. Both are issues of judgment that the reinsured must be allowed to make for the sake of encouraging settlement. Review of either type of decision has an equal likelihood of undermining settlement and fostering litigation.

Most settlements of complex environmental claims necessarily involve a number of sites, a range of years in which the exposure could have occurred, and -- if the reinsured and the insured have an ongoing relationship -- more than one policy of insurance. If a reinsured could be forced into litigation over its good faith judgment as to which policies covered which losses, it would be impossible for it to come to any settlement of such complex claims. When several reinsurers are involved, there would be a risk of successive litigations, in which each reinsurer offered an alternative allocation model that would reduce its own liability.

This conclusion is bolstered by the flexible state of the law in this area. One recent analysis identifies four major

theories of when environmental damage triggers insurance coverage, and four methods of allocating losses among policies. See Michael J. Brady and Lawrence O. Monin, Reinsurance Disputes: Death of the Handshake, 61 Def. Couns. J. 529 (1994); see also David O. Larson, et al., Review of Recent Developments in Excess, Surplus Lines, and Reinsurance Law, 32 Tort & Ins. L.J. 359, 363-64 (1997) (describing the range of permissible allocation methods). A ceding insurer could, in good faith, select any one of sixteen options, only to have its various reinsurers each propose an alternative formula. If the "follow the settlements" principle did not apply to the allocation of those settlements, litigation would surely proliferate. See Lawrence O. Monin and Michael J. Brady, Updating Reinsurance Law Developments: The Gloves Are Beginning to Come Off, 63 Def. Couns. J 219 (1997) (concluding that "the courts, with rare exceptions, are favoring good-faith reasonable allocations by the ceding companies").

I therefore conclude that the doctrine of "follow the settlements" requires the reinsurer to follow the reinsured's good faith and reasonable allocation of settlement dollars between different policies and sites. Therefore, my conclusion as to the reasonableness and good faith of CU's allocation of the Teledyne settlement dispenses with Seven Provinces' challenges to payment on this front.

B. CU's 93A Claim

Chapter 93A allows one business to sue another over conduct that is "unfair," Mass. Gen. L. ch. 93A, § § 2(a), 11, including acts that are associated with the breach of a contract. The plaintiff must prove both that the act was unfair, and that it suffered a loss as a result. Mass. Gen. L. ch. 93A, § 11. CU has shown the loss it suffered: an over four year delay in payment and significant legal costs in collecting the amount it is owed. See *Refuse & Envtl. Sys., Inc. v. Industrial Svcs., 932 F.2d 37, 43 (1st Cir. 1991)* (litigating a

meritless claim may constitute a 93A violation). The more difficult question is whether Seven Provinces' conduct was sufficiently unfair so as to rise to the level of "rascality" required by chapter 93A. See *Levings v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498, 396 N.E.2d 149, 153 (Mass. App. Ct. 1979); Quaker State Oil Refining v. Garrity Oil Co., 884 F.2d 1510, 1513 (1st Cir. 1989)* (adopting Levings standard); accord *Ahern v. Scholz, 85 F.3d 774, 798 (1st Cir. 1996).*

Although "mere breaches of contract, without more, do not violate chapter 93A," *Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc., 754 F.2d 10, 18 (1st Cir.1985)* (citing *Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 390 N.E.2d 243, 251 (Mass. 1979); Bradley v. Dean Witter Realty, 967 F. Supp. 19, 29 (D. Mass. 1997),* a 93A claim can nonetheless arise out of a breach of contract, if the breach is "in disregard of known contractual arrangements" and "intended to secure benefits for the breaching party . . . ." *Anthony's Pier Four v. HBC Assocs., 411 Mass. 451, 583 N.E.2d 806, 821 (Mass. 1991); Wang Labs., Inc. v. Business Incentives, Inc., 398 Mass. 854, 501 N.E.2d 1163, 1165 (Mass. 1986).*

As the Massachusetts Supreme Judicial Court has clarified, the theme of the cases in which a breach of contract has amounted to a 93A violation is "the use of a breach of contract as a lever to obtain advantage for the party committing the breach in relation to the other party; i.e., the breach of contract has an extortionate quality that gives it the rancid flavor of unfairness." *Atkinson v. Rosenthal, 33 Mass. App. Ct. 219, 598 N.E.2d 666, 670 (Mass. App. Ct. 1992);* accord *NASCO, Inc. v. Public Storage, Inc., 29 F.3d 28, 33 (1st Cir. 1994)* (citing Atkinson and suggesting that 93A liability would arise where a "defendant knowingly breached a contract in order to secure additional benefits to itself to the detriment of a plaintiff"). Often, the defendant withheld performance without justification in an attempt to renegotiate the terms of the parties' relationship. See *Anthony's Pier*

Four, 583 N.E.2d at 814-815 (arbitrary withholding of architectural approval in order to extort renegotiation of the financial terms of a joint development project found to be a 93A violation); *Pepsi, 754 F.2d at 18* (customer withheld payment due distributor as leverage in bargaining to receive more product in the future). The breaching party's aim is to "force . . . [the other party to the contract] to do what otherwise it could not be legally required to do." Id.

From the outset, Seven Provinces avoided payment on CU's claims submission while seeking to renegotiate the terms of the parties' relationship. At first, Seven Provinces' questions about the claim were linked to its request to come to a global commutation of all business between the two companies. As CU continued to insist on payment of the Teledyne claim before any such commutation would be discussed, Seven Provinces began insisting on a compromise of the Teledyne claim amount, either through mediation or reallocation of the entire Teledyne settlement. Rebisz reiterated at trial that what he was seeking was a compromise, and in apparent pursuit of that goal, he refused to express an opinion about how much Seven Provinces owed on the claim. Thus, Seven Provinces' behavior fits within the 93A framework outlined by the Supreme Judicial Court: it withheld performance due under the contract in order to renegotiate the bargain between the parties and force CU to do what it otherwise was not legally obliged to do, namely, compromise a valid claim.

Seven Provinces' behavior was particularly egregious when seen in the context of the mores of the reinsurance industry, an industry which has operated for centuries on the principle of "utmost good faith" ("uberrimae fidei"). Gottheimer testified to the traditional mores of the industry: that reinsurance is "an honorable engagement," in which "gentlemen's agreements" were secured by a handshake. Under this view, the reinsurer and the reinsured are "partners," who owe each other a duty of "utmost good faith."

Admittedly, these traditions of trust and mutual reliance came under strain in the 1980s. Because of high interests rates, Gottheimer testified, insurers paid less attention to the risks they insured, and the quality of the underwriting began to suffer. At the same time, environmental and asbestos liability began to upset the calculations on which many insurance relationship had been founded. See *Compagnie de Reassurance, 944 F. Supp. at 993.* Trade publications are beginning to note the change in tone, speaking of the "death of the handshake." Brady & Monin, supra.

Seven Provinces' conduct is more in keeping with this new climate. It seems to believe that delaying payment on a bill cannot be a violation of industry practice as long as the reinsured and the reinsurer ultimately reach some compromise. Although relying on the principle of utmost good faith when complaining of CU's refusal to turn over Teledyne underwriting documents, they suggest that it did not govern their own obligations to settle the CU claim, for example by offering full payment with a reservation of rights. In spite of the strain on the doctrine of uberrimae fidei, however, it continues to be a controlling legal principle in the reinsurance industry. See Compagnie de Reassurance de l' *Ile de France v. New England Reinsurance Corp., 57 F.3d 56, 72 (1st Cir. 1995),* cert. denied, *516 U.S. 1109 (1995); North River, 52 F.3d at 1212; Unigard Sec. Ins. Co. v. North River Ins. Co., 4 F.3d 1049, 1066 (2d Cir. 1993); Christiana, 979 F.2d at 278; Allendale Mut. Ins. Co. v. Excess Ins. Co., 992 F. Supp. 278, 1998 WL 59411,* *2 (S.D.N.Y.); *Compagnie, 944 F. Supp. at 994; Employers Reinsurance Corp. v. Admiral Ins. Co., 1990 U.S. Dist. LEXIS 14580, 1990 WL 169756,* *3 (D.N.J.). By violating this established principle, Seven Provinces' actions fell "within . . . the penumbra of some common-law, statutory, or other established concept of unfairness." *PMP Associates, Inc. v. Globe Newspaper Co., 366 Mass. 593, 321 N.E.2d 915, 917 (Mass. 1975).*

Although Seven Provinces' objections to payment bore the hallmarks of bad faith almost from the outset, until the rediscovery of the facultative certificate in August 1995, it had legitimate reasons for concern about the details of its obligations to CU. As Drees himself conceded, it is unusual for neither side to have a copy of the certificate. Any suspicion that the certificate was missing because the relationship had been somehow amended or discharged could have reasonably been reinforced by the discrepancy between the facultative certificate numbers on the Sayre & Toso records and on the Teledyne policy.

However, the genuineness of this concern is called into doubt by Rebisz's testimony that already in February 1995 he believed that Seven Provinces was "more likely than not" CU's reinsurer on the Teledyne risk. Nonetheless, because an insurer is not normally liable under 93A if it denies coverage based on a plausible interpretation of its obligations, see *Alan Corp. v. International Surplus Lines Ins. Co., 823 F. Supp. 33, 44 (D. Mass. 1993)*, aff'd, *22 F.3d 339 (1st Cir. 1994); Lumbermens Mut. Casualty Co. v. Offices Unlimited, Inc., 419 Mass. 462, 645 N.E.2d 1165, 1169 (Mass. 1995)*, I conclude that Seven Provinces is only liable under 93A from the time it discovered the facultative certificate, namely, August 1995.

III. CONCLUSION

Under the terms of the contract between the parties, Seven Provinces owes Commercial Union $ 225,000 as reinsurance on the Teledyne policy. Since it located the facultative certificate memorializing that contractual obligation in August 1995, Seven Provinces' continued refusal to honor its obligations, combined with its constantly shifting and often meritless objections to payment, constituted an egregious breach of its duty of utmost good faith and a violation of Mass. Gen. L. ch. 93A, § 11.

Judgment is entered for the plaintiff in the amount of $ 450,000, representing the amount owed under the fac. cert., multiplied by two pursuant to Mass. Gen L. ch. 93A, plus attorneys' fees since August 1995, and costs. Both parties shall submit pleadings concerning the appropriate date and rate for calculating prejudgment interest. Seven Provinces shall submit its opposition to CU's application for attorneys' fees, if any, by July 2, 1998.

SO ORDERED.

Dated: June 15, 1998

NANCY GERTNER, U.S.D.J.

ORDER

Judgment is entered for the plaintiff in the amount of $ 450,000, representing the amount owed under the facultative certificate, multiplied by two pursuant to Mass. Gen L. ch. 93A, plus attorneys' fees since August 1995, and costs. Both parties shall submit further pleadings on the appropriate date and rate for calculating pre-judgment interest. Seven Provinces shall submit its opposition to CU's application for attorneys' fees, if any, by July 2, 1998.

SO ORDERED.

Dated: June 15, 1998

NANCY GERTNER, U.S.D.J.

----------Footnotes----------

[1] Treaty reinsurance involves the pooling of all policies covering a particular type of risk -- such as all property damage, all liability insurance, or all earthquake insurance --

among a group of insurers, each of whom agrees to cover a certain portion of all claims of that type. The treaty pool is defined by the type of risk, not as in facultative reinsurance. by the identity of the insured of one particular policy.

[2] Facultative reinsurance is reinsurance on a portion of one particular, identified risk, in this case, on 50% of the liability policy between ESLIC and Teledyne in force from July 1963 to July 1964. "Facultative certificate" is the reinsurance industry term for the written record of a facultative insurance contract.

[3] CU officers testified at trial that they have been unable to fully identify or locate this company. In any event, neither party argues that its existence has any affect on the CU-Seven Provinces relationship.

[4] As the plaintiff's expert, Dr. Robert Gottheimer, testified at trial, this is a British spelling of "net" which means "net of commission paid to an agent or broker."

[5] The bracketed numbers are not in the original text.

[6] Gottheimer testified that this was not uncommon in the industry at that time.

[7] He also identified eight Teledyne policies with high excess of loss thresholds that were not considered implicated in the settlement discussion and the significance of which was not raised at trial: policy E4-8381006, 11/1/71-11/1/72, $ 3.5 million in excess of $ 1.5 million; E4-8381003, 11/1/70-11/1/71, $ 3.5 million in excess of $ 1.5 million in excess of the primary insurance; E4-8381004, 11/1/70-11/1/71, $ 13 million in excess of $ 5 million; E4-8381007, 11/1/71-11/1/71, $ 10 million in excess of $ 5 million; E16-8381001, 3/15/68-11/1/70, $ 10 million in excess of $ 1.5 million; E4-8381005, 11/1/70-11/1/71, $ 5 million in excess of $ 18 million; E4-8381008, 11/1/71-11/1/72, $ 5 million in excess of $ 15 million; and E16-8381002, 3/17/69-11/1/70, $ 14 million in excess of $ 10 million.

[8] At the same time, as CU explained in a later letter to Seven Provinces, the fairness of the allocation was also gauged by dividing Teledyne's total clean-up costs by the number of years each site was in operation. Thus, CU felt that a figure of less than one million represented a fair settlement for one year's insurance on the semiconductor site, which had a total clean up cost of almost $ 21 million, spread out over twenty years of operation.

[9] See supra, note 8.

[10] Even had $ 1.95 million been allocated to the semiconductor site, of course, Seven Province's liability, capped at $ 225,000, would have been unaffected.

[11] Rebisz did not make a list of the records he had tabbed, so it is unclear whether these were among them.

[12] For a discussion of this doctrine, see infra, Section II(A)(2)(a).

[13] As defendant's counsel conceded in open court, moreover, it had never been raised in the litigation at all until defendant's cross-examination of Drees on the third day of trial.

No. 99-1258

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMERCIAL UNION INSURANCE COMPANY, as Successor in Interest to Employers' Surplus Lines Insurance Company,
Plaintiff, Appellee,

v.

SEVEN PROVINCES INSURANCE COMPANY, LTD.,
Defendant, Appellant.

8/28/2000

ORDER

Chief Judge Torruella, Circuit Judges Selya, Boudin, Stahl, * and Lipez

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

*Judge Lynch is recused from this case

MASSACHUSETTS GENERAL LAWS ANNOTATED

PART I. ADMINISTRATION OF THE GOVERNMENT
TITLE XV. REGULATION OF TRADE.
CHAPTER 93A. REGULATION OF BUSINESS PRACTICES FOR CONSUMERS PROTECTION.

Section 2. Unfair practices; legislative intent; rules and regulations

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

* * *

Section 11. Persons engaged in business; actions for unfair trade practices; class actions; damages; injunction; costs

Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two or by any rule or regulation issued under paragraph (c) of section two may, as hereinafter provided, bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-five C, whether by way of original complaint, counterclaim, cross-claim or third-party action for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

Such person, if he has not suffered any loss of money or

property, may obtain such an injunction if it can be shown that the aforementioned unfair method of competition, act or practice may have the effect of causing such loss of money or property.

Any persons entitled to bring such action may, if the use or employment of the unfair method of competition or the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective, practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such a manner as the court directs.

A person may assert a claim under this section in a district court, whether by way of original complaint, counterclaim, cross-claim or third-party action, for money damages only. Said damages may include double or treble damages, attorneys' fees and costs, as hereinafter provided, with provision for tendering by the person against whom the claim is asserted of a written offer of settlement for single damages, also as hereinafter provided. No rights to equitable relief shall be created under this paragraph, nor shall a person asserting such claim be able to assert any claim on behalf of other similarly injured and situated persons as provided in the preceding paragraph. The provisions of sections ninety-five to one hundred and ten, inclusive, of chapter two hundred and thirty-one, where applicable, shall apply to a claim under this section, except that the provisions for remand, removal and transfer shall be controlled by the amount of single damages claimed hereunder.

If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the use or employment of the method of competition or the act or practice was a willful or knowing violation of said section two. For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence regardless of the existence or nonexistence of insurance coverage available in payment of the claim. In addition, the court shall award such other equitable relief, including an injunction, as it deems to be necessary and proper. The respondent may tender with his answer in any such action a written offer of settlement for single damages. If such tender or settlement is rejected by the petitioner, and if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner, then the court shall not award more than single damages.

If the court finds in any action commenced hereunder, that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and costs incurred in said action.

In any action brought under this section, in addition to the provisions of paragraph (b) of section two, the court shall also be guided in its interpretation of unfair methods of competition by those provisions of chapter ninety-three known as the Massachusetts Antitrust Act.

No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth. For the purposes of this paragraph, the

burden of proof shall be upon the person claiming that such transactions and actions did not occur primarily and substantially within the commonwealth

(2)

Supreme Court, U.S.
FILED
JAN 2 2001
CLERK

No. 00-888

IN THE

Supreme Court of the United States

THE SEVEN PROVINCES INSURANCE COMPANY N.V.,

Petitioner,

v.

COMMERCIAL UNION INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

BRUCE M. FRIEDMAN
Counsel of Record
JAMES T. LIELL
RUBIN & FIORELLA LLP
Counsel for Respondent
90 Park Avenue
New York, New York 10016
(212) 953-2381

164378

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

19 pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the United States Supreme Court should exercise its discretion to address an issue not presented to nor made a part of the decision of the First Circuit Court of Appeals.

2. Whether the doctrine of "follow the settlements" is a principle of state law, and (a) if so, how the federal court expanded existing Massachusetts state, and (b) if not, how state law is at all impacted by the decision of the federal court.

3. Whether the United States Supreme Court should exercise its discretion to review findings of fact made by the District Court and affirmed by the Court of Appeals concerning the application of state law to the particular facts presented below.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Commercial Union Insurance Company, as Successor in Interest to Employers' Surplus Lines Insurance Company, is wholly owned by CGU Corporation of Delaware which is not publicly traded.

TABLE OF CONTENTS

	Page
Counter-Statement of Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Reasons for Denying the Writ	1
I. Seven Provinces Has Not Set Forth Any Justification For The Exercise Of The Supreme Court's Judicial Discretion In Granting A Petition For Writ Of *Certiorari*.	2
II. The District Court And First Circuit Correctly Found That Petitioner Was Indebted To Respondent Under The Reinsurance Contract.	4
A. Petitioner failed to raise the allocation issue on appeal to the First Circuit, and therefore, may not raise it here.	4
B. Petitioner has no viable defense for its non-payment or its actions in refusing to make payment under the reinsurance certificate.	6

Contents

Page

C. Neither the District Court's nor the First Circuit's opinion impermissibly expands state law. 7

III. Both The District Court And The First Circuit Correctly Found That Seven Provinces Committed An Unfair And Deceptive Practice And Was, Accordingly, Liable Under M.G.L. Chapter 93a. 9

A. The District Court correctly interpreted and applied Massachusetts law in finding Seven Provinces in violation of M.G.L. Chapter 93A. 9

B. Seven Provinces' argument that the lower court misapplied reinsurance law concerning the "unfair or deceptive acts or practices" claim against Seven Provinces mischaracterizes both the issue and finding. 10

Conclusion 11

TABLE OF CITED AUTHORITIES

Page

Cases:

Adickes v. S.H. Kress Inc., 398 U.S. 144, 90 S. Ct. 1598 (1970) 6

EEOC v. Federal Labor Relations Auth., 476 U.S. 19, 106 S. Ct. 1678 (1986) 5

Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938) 8

Matsushita Elec. Indus. Co. v. Epstien, 516 U.S. 367, 116 S. Ct. 873 (1996) 5

Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 118 S. Ct. 1952 (1998) 5

Statute:

M.G.L. Chapter 93A 3, 4, 7, 9, 11

Rule:

United States Supreme Court Rule 10 .....1, 2, 3

REASONS FOR DENYING THE WRIT

Petitioner, The Seven Provinces Insurance Company N.V. (hereinafter either "Petitioner" or "Seven Provinces"), has failed to advance, let alone support, any argument why this Court should grant its Petition for Writ of *Certiorari* (hereinafter, the "Petition"), either pursuant to Supreme Court Rule 10, or because there exists any other compelling reason for this court to exercise its discretion. The decision of the Court of Appeals for the First Circuit (hereinafter, the "First Circuit") is not in conflict with any decision of the United States Supreme Court, any state's highest court or any other circuit court of appeal. Nor has the Petitioner demonstrated that the First Circuit has "departed from the accepted and usual course of judicial proceedings."

Moreover, this matter is not properly before this Court since the primary issue raised by the Petitioner — its right and/or ability to challenge Respondent's allocation of settlement amounts paid to its insured in order to resolve an insurance coverage dispute — was not presented on appeal. The Petitioner's only other substantive argument is a request to revisit the District Court's findings of fact, as affirmed by the Court of Appeals. Only in very rare circumstances will the Supreme Court reweigh factual findings or review the misapplication of properly stated law.

This case presents no far-reaching ramifications, as the questions of fact and application of law to those facts concerning which the Petitioner seeks review, are particular to this case. Additionally, the balance of power between reinsurers and ceding companies is not upset. Rather, the First Circuit's decision restates existing industry practice (as recognized by multiple judicial decisions) which requires

insurance companies to make all their settlement decisions in a reasonable manner, and obliges reinsurers to reimburse a ceding company for risks covered by the reinsurance agreement so long as the ceding company's actions are reasonable and taken in good faith.

I. SEVEN PROVINCES HAS NOT SET FORTH ANY JUSTIFICATION FOR THE EXERCISE OF THE SUPREME COURT'S JUDICIAL DISCRETION IN GRANTING A PETITION FOR WRIT OF *CERTIORARI*.

Petitioner has not set forth any justification, pursuant to Supreme Court Rule 10, for this Court to exercise its judicial discretion in granting the Petition. Most importantly, Petitioner has pointed to no "compelling reasons" why this Court should use its limited resources in hearing this matter which, cut to the core, would have been a garden-variety breach of contract action but for the incredible lengths to which Petitioner was prepared to go in order to avoid its contractual obligations. The decision of the First Circuit was a proper statement of the law and correctly applied to the facts — indeed, compelled by the facts — and is not in conflict with any other law, rule or policy. The opinion of the First Circuit does not contradict any existing law, nor as Petitioner argues, does it tip the balance of power existing between reinsurers and ceding companies.

Petitioner has not pointed to any of the considerations listed in Supreme Court Rule 10 to show why the Supreme Court should grant *Certiorari* in this matter. The Petition is nothing more than a menagerie of boiler-plate, conclusory assertions which, when viewed in the light of evidentiary presentations, were soundly and justifiably rejected by the

courts below. The detailed findings of fact and conclusions of law would have been the same had they been made or affirmed in any decision rendered by any other circuit addressing the doctrine of follow the settlements. Specifically, Petitioner has not stated how the decision of the First Circuit is in conflict with either a decision of the United States Supreme Court, another Circuit Court of Appeals, or any state's highest court. Nor has Petitioner demonstrated how the First Circuit has "so far departed from the accepted and usual course of judicial proceeding . . . as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10. Finally, Petitioner has not stated any important question of Federal Law that needs to be settled by this Court, particularly where the underlying matter involves an insurance dispute, which is a uniquely state specific issue.

Apart from the considerations of Supreme Court Rule 10, none of Petitioner's arguments warrant review by this Court as they are not part of the decision below. Petitioner's primary argument before this Court, which concerns the doctrine of "follow the settlements," was not raised in the First Circuit, and accordingly, was not a part of its decision. Petitioner is therefore requesting this Court to review a decision concerning an issue to which Petitioner itself did not assign error. Petitioner's only other substantive argument, the finding of liability pursuant to M.G.L. Chapter 93A (hereinafter, "Chapter 93A"), is strictly a request to reweigh findings of fact which were made by the District Court, and affirmed by the First Circuit. These factual findings are, of course, unique to this case, with no far reaching implications. There is no reason either under Supreme Court Rule 10 or otherwise to grant the Petition.

II. THE DISTRICT COURT AND FIRST CIRCUIT CORRECTLY FOUND THAT PETITIONER WAS INDEBTED TO RESPONDENT UNDER THE REINSURANCE CONTRACT.

A. Petitioner failed to raise the allocation issue on appeal to the First Circuit, and therefore, may not raise it here.

Petitioner did not raise as an "issue presented" on appeal to the First Circuit that the District Court erred either in restricting Petitioner's right to challenge Petitioner's settlement allocation, or in failing to conclude that Respondent allocated settlement dollars among policies unreasonably or in the absence of good faith. Petitioner now asserts that because Petitioner has been obliged to honor Respondent's claim submission under the parties' reinsurance certificate, the First Circuit has somehow expanded the concept of follow the settlements to apply similarly to allocation of the settlement dollars. Indeed, nowhere in the Brief of Appellant does the Petitioner even mention its allocation issue.[1] The only issues raised and argued by Petitioner in the First Circuit were the Chapter 93A issue and various questions of fact related to whether Petitioner

---

1. Even if the issue had been presented to the First Circuit, it would have been as exaggerated as it is being presented to this Court. The District Court went no further than conclude that a ceding insurance company's allocation of settlement dollars will be assessed by the same standards of reasonableness and good faith attendant to the settlement. Since the reinsurance industry universally accepts the proposition that the allocation must follow and be consistent with the settlement itself, the District Court's finding can hardly be characterized as anything new, let alone an unwarranted expansion of the law.

acted reasonably in delaying payment under the reinsurance certificate. It is only at the end of its Reply Brief that Petitioner even mentions the allocation issue on appeal to the First Circuit, and then only as a purported excuse for Petitioner's delay in paying Respondent pursuant to the reinsurance certificate. Significantly, Petitioner's Reply Brief expressly states that the allocation issue was not an essential issue at trial, nor on appeal, and even concedes that "Seven Provinces did not ask that the District Court alter Commercial Unions' allocation." (Reply Brief at pp. 21-22).

As a general rule, the Supreme Court of the United States will not address issues which were not raised in the Court of Appeals when reviewing decisions of that court. *EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 24, 106 S. Ct. 1678, 1681 (1986) ("our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals"); *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952 (1998); *Matsushita Elec. Indus. Co. v. Epstien*, 516 U.S. 367, 116 S. Ct. 873 (1996). On Petition for Writ of *Certiorari* the review of this Court is for error in the decision of the Court of Appeals, and the Supreme Court "generally do[es] not address arguments that were not the basis for the decision below." *Matsushita*, 516 U.S. at 379, 116 S. Ct. at 880 (citations omitted).

Certainly there can be no compelling reason to grant *certiorari* and review a decision of the First Circuit concerning an issue which the First Circuit did not even consider due to Petitioner's failure to raise and argue the issue before the First Circuit. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. at 213, 118 S. Ct. 1956 ("where issues are neither raised before nor considered by

the Court of Appeals, this Court will not ordinarily consider them") (citing *Adickes v. S.H. Kress Inc.*, 398 U.S. 144, 147, n.2, 90 S. Ct. 1598, 1602, n.2 (1970). Petitioner may not now reargue the allocation issue. Having been deprived of the issue, one is at a loss to understand how the First Circuit can be said to have even considered the issue let alone having resolved it through an unwarranted expansion of the law and thereby creating a conflict among the circuit courts.

B. Petitioner has no viable defense for its non-payment or its actions in refusing to make payment under the reinsurance certificate.

The decision of the First Circuit does not focus on Respondent's allocation of settlement dollars to its insurance policies, as that issue was not presented to that Court by Petitioner. Instead, the First Circuit's holding centered on the ultimate conclusion that on the basis of the evidentiary record, the District Court had justification to conclude that Petitioner was obligated to make payment to Respondent, and that its decision to delay making such payment was predicated upon improper motivation.

The District Court and First Circuit both found that there was a valid and enforceable contract, with no valid exclusion or exception on which Seven Provinces could rely. Notably, the First Circuit did not hold, as Petitioner here argues, that the "follow the settlements" doctrine prohibits reinsurers from challenging any and all pre- and post-settlement decisions made by the ceding company. Rather, the District Court held that reinsurers must pay for losses which fall within the scope of a reinsurance agreement, and are bound by their ceding companies' reasonable and good faith settlement and allocation determinations. (Petition at 62a).

The First Circuit upheld the finding that a delay in such payment does constitute an unfair practice within the meaning of Chapter 93A. (Petition at 15a-16a).

C. Neither the District Court's nor the First Circuit's opinion impermissibly expands state law.

The doctrine of "follow the settlements" has never been limited to pre-settlement decisions. Respondent is unaware of any pre-existing authority in any federal or Massachusetts state court in which it has been held that "follow the settlements" does not apply to allocation of settlement dollars. Accordingly, Petitioner has been unable to cite to any authority to support its contention that the "follow the settlements" doctrine is inapplicable to allocation decisions. The distinction that Petitioner attempts to draw, i.e., that a ceding company's allocation decisions should be judged by standards other than those governing the ceding company's settlement decisions, is as arbitrary as it is unworkable, is inconsistent with accepted norms in the reinsurance industry, and in the words of District Court, is "a distinction without a difference". (Petition at 61a).

To the contrary, a holding that the "follow the settlements" doctrine is inapplicable to a ceding company's reasonable allocation determinations, as advocated by Petitioner herein, would constitute a departure from uniform precedent in both state and federal courts, thereby (a) creating a state of chaos in the prompt resolution of reinsurance claim submissions, and (b) carving out an exception to the "follow the settlement" doctrine. That doctrine requires reinsurers to pay ceding companies for amounts which ceding companies pay to their insureds under policies covered by the reinsurance contract, so long as the ceding companies' actions are reasonable and taken in good faith.

Petitioner's argument that the First Circuit should err in favor of finding no liability is misapplied in the instant matter. Rather, even if applicable, the Court should err in favor of upholding the century old doctrine of "follow the settlements" and preventing its further erosion. While the doctrine is imperfect, it nonetheless provides certainty and consistency in the handling of the business in an industry that is essentially self-policing. It is not for the courts to disturb in any way a custom and practice that was adopted by the participants in the industry and continues as the foundation that governs insurers' relationships *inter se*.

Petitioner's reliance on *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), is misplaced. The *Erie* decision stands only for the proposition that federal courts cannot, under the circumstances presented in *Erie*, substitute federal "general" law for conflicting state law. *Erie* does not stand for the proposition that a federal court must abstain from any decision in which a party, such as Petitioner, argues for an exception to a state rule or law. In any event, the doctrine of "follow the settlements" is not a principle of state law. It is a doctrine which evolves from custom, practice and usage in the industry and is simply "plugged into" specific factual scenarios by courts that have considered application of the doctrine. The District Court, as affirmed by the First Circuit, applied a century old doctrine which Petitioner did not challenge as inapplicable. Petitioner has not cited any Massachusetts authority in its attempt to demonstrate how the District Court or First Circuit has contradicted or misapplied such alleged authority.

The District Court held that it would judge a ceding company's settlement decisions, including its allocation determinations, under one standard. Applying that

standard, the District Court, as affirmed by the First Circuit, reviewed the reasonableness of Respondent's conduct, and specifically confirmed the reasonableness of the allocation. (Petition at 39a). Petitioner, was, therefore, obligated to make payment for its share of the insurance settlement.

III. BOTH THE DISTRICT COURT AND THE FIRST CIRCUIT CORRECTLY FOUND THAT SEVEN PROVINCES COMMITTED AN UNFAIR AND DECEPTIVE PRACTICE AND WAS, ACCORDINGLY, LIABLE UNDER M.G.L. CHAPTER 93A.

A. The District Court correctly interpreted and applied Massachusetts law in finding Seven Provinces in violation of M.G.L. Chapter 93A.

The imposition of liability for "unfair or deceptive acts or practices" concerning the instant matter, is strictly a state law issue which in Massachusetts, is governed by Chapter 93A. Chapter 93A provides for damages for an injured party who suffers loss from any unfair or deceptive act or practice in the conduct of trade or commerce, and such liability may be predicated upon conduct surrounding a breach of contract.

Both the District Court and First Circuit correctly found that the conduct surrounding Petitioner's four-year delay in paying Respondent constituted unfair or deceptive acts or practices which caused Respondent to suffer loss. The District Court found the entire history of Petitioner's conduct as being one of "evasiveness and obstructionism" (Petition at 52a). More specifically, the District Court found that Petitioner deliberately avoided coming to any conclusion as to what amount, if any, was owed to Respondent, in an attempt to

compromise the bill, by negotiating a settlement, arbitrating or mediating. The District Court found untenable Petitioner's tactics in relying on ever-shifting defenses, many of which the court found groundless. (Petition at 54a-56a). Ultimately, the District Court concluded that Petitioner "withheld performance due under the contract in order to renegotiate the bargain between the parties and force Commercial Union to do what it otherwise was not legally obligated to do, namely compromise a valid claim." (Petition at 64a).

B. Seven Provinces' argument that the lower court misapplied reinsurance law concerning the "unfair or deceptive acts or practices" claim against Seven Provinces mischaracterizes both the issue and finding.

The Petition does not address what laws were misapplied, other than argue that the "follow the settlements" doctrine should have applied. The District Court, as affirmed by the First Circuit, found that Seven Provinces engaged in an ongoing course of bad faith and unfair or deceptive practices in delaying the payment to Respondent under the reinsurance certificate for more than four years.

In arguing against the imposition of liability for "unfair or deceptive acts or practices", Petitioner makes precisely the same conclusory assertions which were rejected by the findings of fact made by the District Court. That Court was in a superior position to evaluate the facts and witnesses, and specifically found Seven Provinces' witnesses were not to be believed. When the credibility of a party's witnesses are expressly questioned by the finder of fact, it is hardly a stretch of logic to expect that the court would similarly find that said party was motivated by bad faith considerations in

its out of court business dealings. Petitioner is asking this Court to revisit the factual findings of the District Court which ultimately held that Petitioner's multi-faceted efforts and tactics over the course of its four-year delay constituted unfair or deceptive acts or practices.

Contrary to Petitioner's argument, it is not the denial of payment to the ceding company based upon a plausible defense which resulted in Petitioner's Chapter 93A liability, but rather, the totality of all the evidence concerning Petitioner's conduct which "bore the hallmarks of bad faith almost from the outset" that resulted in the District Court's finding of liability under Chapter 93A and the First Circuit's affirmation of that finding. (Petition at 66a). Nor was the special nature of the reinsurance relationship the basis for imposing bad faith liability upon Petitioner. The District Court had already found a violation of Chapter 93A when it made the observation that "Seven Provinces' behavior was particularly egregious when seen in the context of the mores of the reinsurance industry, an industry which has operated for centuries on the principle of 'utmost good faith' ". (Petition at 64a).

CONCLUSION

Petitioner has set forth no compelling reason why the United States Supreme Court should grant the Petition for Writ of *Certiorari* in the instant matter. Its request is based principally upon an argument which was not even advanced to the First Circuit, and therefore, could not have been a basis for that decision. Petitioner's only other contention, stripped to its essence, is that its witness should have been believed. The findings of fact of the District Court have already been reviewed and upheld by the First Circuit.

The resolution of the facts of this particular case will, of course, have no far reaching consequences. Each case will continue to be capable of adjudication, either in the traditional arbitration setting or in the courts, based upon its own unique facts and circumstances. Nor are there any other far reaching adverse implications resulting from the decision of the First Circuit. The business of reinsurance will function as efficiently as it has in the past with insurers and reinsurers of commercial integrity continuing to act in utmost good faith. Parties to reinsurance contracts will continue to be able to advocate coverage positions, and in the proper case, to resist questionable claim submissions where there is a basis to contend that the submission is unreasonable and not presented in good faith.

The decision of the First Circuit will not upset the traditional roles of reinsurers or ceding companies, but will continue to require ceding companies to make their settlement determinations in a reasonable manner, and will further continue to require reinsurers to honor covered claims submitted reasonably and in good faith under reinsurance contracts. Petitioner has actively lobbied for industry support for the propositions advanced in its Petition, but apparently without success. That alone speaks volumes to the merits of Petitioner's forecast of doom for the reinsurance industry.

The amount of time, expense and judicial resources wasted as a direct consequence of Petitioner's recalcitrance have been appropriately addressed by the imposition of well-deserved sanctions. It is time for these proceedings to conclude and for Respondent to be paid.

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

BRUCE M. FRIEDMAN
Counsel of Record
JAMES T. LIELL
RUBIN & FIORELLA LLP
Counsel for Respondent
90 Park Avenue
New York, New York 10016
(212) 953-2381